United States Court of Appeals

for the Second Circuit

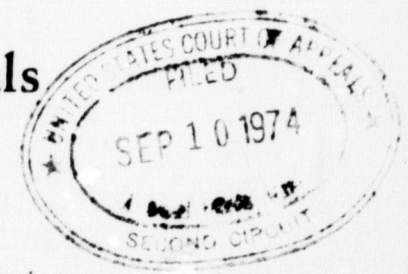
APPENDIX

74-2004; 74-2041

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA,
Respondent,

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY, d/b/a "THE NEVELE,"
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX

E. STEWART JONES, ESQ.,
28 Second Street,
Troy, New York 12181,
(518) 274-5820.

HERALD PRICE FAHRINGER, ESQ.,
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Buffalo, New York 14202,
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Attorneys for Appellants.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS.

Relevant Docket Entries.

1973

March 19 — BEN J. SLUTSKY - Filed Judgment (# 73,287) deft is committed to custody of the Atty. Gen'l for imprisonment for a period of THREE YEARS, and fined $5,000.00 together with the costs of prosecution, on each of counts 2 and 3; and to FIVE YEARS, and fined $10,000.00 together with the costs of prosecution, on each of counts 7, 8, 9. The deft may become eligible for parole at such time as the board of parole may determine under 18 U.S.C. 4208(a)(2). Prison sentences imposed on counts 2, 3, 7, 8 and 9 shall run concurrently with each other, but the fines imposed on each of those counts are to be consecutive, making a total fine of $40,000.00 together with the costs of prosecution, the deft is to stand committed until the total fine, together with the costs of prosecution is 1/2 paid, or he is otherwise discharged by operation of law. Fines imposed are stayed, pending appeal. MacMahon, J. Entered 3-21-73

March 19 — JULIUS SLUTSKY - Filed Judgment (# 73,288) deft is committed to custody of the Atty. Gen'l for imprisonment for a period of THREE YEARS, and fined $5,000.00 together with the costs of prosecution, on count 1; and to FIVE YEARS, and fined $10,000.00 together with the costs of prosecution, on each of counts 4, 5, and 6. The deft may become eligible for parole at such time as the Board of parole may determine under 18 U.S.C. 4208(a)(2); The prison sentences imposed on counts 1, 4, 5, and 6 are to run concurrently with each other, but the fines imposed on each of those counts are to be consecutive, making a total fine of $35,000.00 together with the costs

Relevant Docket Entries.

1973

of prosecution. The deft is to stand committed until the total fine, together with the costs of prosecution is paid, or he is otherwise discharged by operation of law. Fines imposed are stayed, pending appeal. MacMahon, J. Entered 3-21-73

1974

May 21 — BEN SLUTSKY AND JULIUS SLUTSKY - Filed notice of motion for new trial, With affdvt.

May 21 — SLUTSKY's - Filed memo of law in support of motion.

May 21 — Filed true copy of mandate from Clerk U.S.C.A. with slip opinion. Judgments affirmed in part and reversed in part, judgments of conviction on cts. 1-3 are vacated. (n/m)

June 10 — BEN SLUTSKY & JULIUS SLUTSKY - Filed Gov't Memorandum of law in opposition to Deft's motion for a New Trial and for Bail.

June 10 — BEN SLUTSKY & JULIUS SLUTSKY - Filed Gov't Affdvt in opposition to Defts motion for a New Trial and for Bail.

July 8 — BEN J. SLUTSKY & JULIUS SLUTSKY - Filed Affidavit of Service by Mail, of Gail Vance, that on the 14th day of June, 1974, she served Deft's Reply Memorandum of Law upon Paul J. Curran, Esq., U. S. Atty for the SDNY via Airmail.

July 18 — BEN SLUTSKY & JULIUS SLUTSKY - Filed Memo Endorsement on Defts motion for a new trial. Motion denied, a memorandum decision is to follow. SO ORDERED - MacMAHON (N/Mailed)

Relevant Docket Entries.

1974

July 22	BEN SLUTSKY & JULIUS SLUTSKY - Filed Defts Motion for Reduction of Sentence under Rule 35 of the Federal Rules of Criminal Procedure and Memorandum of Law.
July 24	BEN SLUTSKY & JULIUS SLUTSKY - Filed Pltff's affdvt in opposition to the motion filed on behalf of Deft's, dtd 7-22-74, for reduction of their sentences.
July 10	BEN SLUTSKY & JULIUS SLUTSKY - Filed Pltff's Memorandum of Law in opposition to Deft's Motions for a new trial and for bail.
July 24	BEN SLUTSKY & JULIUS SLUTSKY - Filed Deft's Reply Memorandum of Law.
July 24	BEN SLUTSKY & JULIUS SLUTSKY - Filed Pltff's Memorandum Decision #40998 regarding Defts motion for a new trial and for bail. Motion denied - SO ORDERED - MacMAHON, J. (n/m)
July 24	BEN SLUTSKY & JULIUS SLUTSKY - Filed a MEMO ENDROSEMENT on Deft's Motion for Reduction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure and Memorandum of Law. Accordingly, we deny the instant motion in all respects. — MacMAHON, J.
July 25	BEN SLUTSKY & JULIUS SLUTSKY - Filed Notice of Appeal to the U.S.C.A., 2nd Circuit, from the order denying their motion for a new trial and a hearing. (Mailed Notices)
July 29	BEN SLUTSKY & JULIUS SLUTSKY - Filed Notice of Appeal to the U.S.C.A., 2nd Circuit from the order denying their motion for reduction of sentence. (Mailed Notices)

Notice of Motion for a New Trial.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "THE NEVELE"

NOTICE OF MOTION
FOR A NEW TRIAL

Defendants.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmations of HERALD PRICE FAHRINGER and E. STEWART JONES and the other affidavits, reports and exhibits annexed hereto, the undersigned will move this Court on behalf of BEN J. SLUTSKY and JULIUS SLUTSKY on May 24, 1974 at 2:15 p.m. in Room 1506 of the United States Courthouse at Foley Square, New York, New York, or as soon thereafter as counsel can be heard, for an order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure or, in the alternative, a hearing to determine any and all issues relating to this application, and for an order granting bail to petitioners pending the outcome of this application, and for such other and further relief as is just under all the circumstances.

Dated: May 17, 1974
Buffalo, New York

YOURS, etc.,

E. STEWART JONES, ESQ.
28 Second Street
Troy, New York 12181

HERALD PRICE FAHRINGER, ESQ.
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

Attorneys for Petitioners

TO: PAUL J. CURRAN, ESQ.
UNITED STATES DISTRICT [redacted]EY
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Attorney's Affirmed Statement.

I N D E X

(index continued on following page)

Attorney's Affirmed Statement.

INDEX (CONTINUED)

Attorney's Affirmed Statement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

ATTORNEY'S
AFFIRMED STATEMENT

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "The Nevele",

Defendants.

STATE OF NEW YORK)
COUNTY OF ERIE : ss.
CITY OF BUFFALO)

HERALD PRICE FAHRINGER, affirms and states:

1. I am an attorney duly licensed to practice law in the State of New York with offices at One Niagara Square, Buffalo, New York. E. STEWART JONES is an attorney with law offices at 28 Second Street, Troy, New York 12181 and is acting as co-counsel in this application. We are both familiar with the facts and circumstances surrounding this case.

History of Case

2. In 1972 the defendants were indicted by a grand jury empanelled in the Southern District of New York for attempted income tax evasion and filing false tax returns in violation of §§7201, 7206 of Title 26 of the United States Code. Petitioners were represented by Louis Bender and Moses Kove, with offices at 225 Broadway, New York, New York. Following a jury trial on January 9, 1973, the defendants were found guilty in

the United States District Court for the Southern District of New York of the crimes charged in the indictment, and on March 19 of that same year, each of the defendants was sentenced to five years' imprisonment by the Honorable Lloyd F. MacMahon. A $40,000 fine was imposed on Ben Slutsky and a $35,000 fine was levied against Julius Slutsky. The cost of the prosecution was taxed against each of the defendants.

3. An appeal was mounted to the United States Court of Appeals for the Second Circuit, and on September 24, 1973 that court affirmed the defendants' convictions of tax evasion but reversed and vacated the false filing convictions. This modification of the judgment of conviction reduced the fines imposed to $30,000 for each of the defendants but left the prison sentences unaltered.

4. Within the time provided by statute a petition for rehearing was filed in the United States Court of Appeals for the Second Circuit and that application was denied on October 31, 1973. The United States Court of Appeals for the Second Circuit stayed the mandate in this case and the defendants have remained on bail throughout these proceedings.

5. In October of 1973, the defendants engaged E. STEWART JONES and HERALD PRICE FAHRINGER to represent them in filing a petition for certiorari with the United States Supreme Court and to attend to other matters connected with this case.

6. On January 2, 1974 a petition for certiorari was

was filed with the United States Supreme Court pursuant to §1254(1) of Title 28 of the United States Code. On April 15, 1974 the United States Supreme Court denied the defendants' petition for certiorari.

7. On April 22, 1974 the defendants filed a petition for rehearing with the United States Supreme Court requesting that the Court vacate its denial of the petition for a writ of certiorari and grant the petition and direct review of the judgment and opinion of the United States Court of Appeals for the Second Circuit. That petition is still pending.

8. This is a motion for a new trial based upon newly discovered evidence and on other grounds made pursuant to Rule 33 of the Federal Rules of Criminal Procedure. We have conveniently divided the various branches of our application under appropriate subheadings. On the following page there appears an index which sets forth a listing of the components of this motion, together with the other affidavits supplied in support of our claims.

Attorney's A[illegible] Statement.

Government's Theory of Prosecution

9. In order to place this motion for a new trial in proper perspective, we must review the government's theory of prosecution during the trial.

10. In 1969 the Internal Revenue Service began a tax investigation of the Nevele Hotel using solely as a basis the bank deposit method for reconstructing income. The government investigated six bank accounts related either to the Nevele or BEN and JULIUS SLUTSKY. However, the investigation eventually focused on two major business accounts maintained in the name of the Nevele in the First National Bank and Trust Company of Ellenville and the Ellenville National Bank. The other four bank accounts explored by the government were: a bank account in the Sullivan National Bank; a savings account under the name of Julius and Benjamin Slutsky; a Julius and Alice Slutsky checking account; an Alice Slutsky checking account. The latter three accounts were maintained in the Ellenville National Bank.

11. There were deposits of $14.8 million in those two central acccunts for the three-year period 1965 through 1967. For ease of comprehension, we have rounded off all these bank deposit figures.

12. The government only investigated deposits in these accounts of checks over $1,000.00 which totaled $5.3 million. The government found $3.8 million to consist of non-income items. Accordingly the prosecution merely reduced the total deposits of $14.8 million by $3.8 million and charged the balance of $11 million to gross receipts.

13. This $11 million figure consisted of $1.5 million in checks over a thousand dollars; $8.5 million in checks under a thousand dollars and $1 million in cash. This amount was then discounted by the direct costs, expenses, and depreciation claimed on petitioners' tax return. Without investigating additional non-income deposits, for which explanations were furnished by petitioners, the government arbitrarily claimed $1.2 million as unreported income.

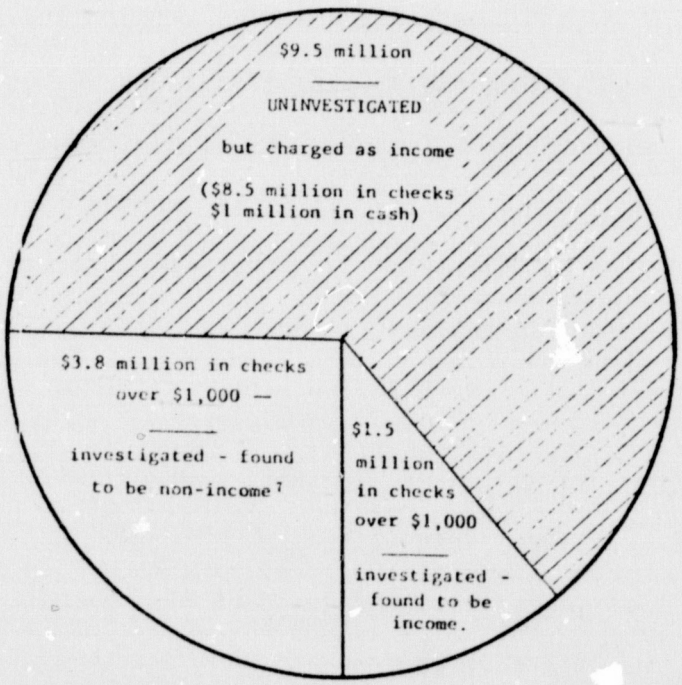
14. The government refused to investigate the petitioners' leads concerning the $8.5 million in checks under one thousand dollars, which included the $1.2 million charged in the indictment. Consequently, it is undisputed that this huge amount charged as income against the petitioners was never verified. The United States Court of Appeals for the Second Circuit in reviewing this judgment concluded:

> "Almost $8.6 million, however, was in unidentified items, and a further $1 million was in currency. Appellants' principal attack on the sufficiency of the government's investigation focuses on this large sum of unidentified checks and currency charged as income."

15. The great extent to which checks in those accounts remained unverified was reflected in the Government's Exhibits. Those exhibits show that for three years over $8.5 million in checks under $1,000 were deposited in these accounts and were unidentified. The government simply charged the entire amount to the petitioners as income. Similarly, and also with no

analysis whatsoever, the government charged cash deposits in these accounts of over $1 million as income to petitioners. The following chart illustrates the enormity of this failure to investigate.

$14.8 Million Total Deposits in the
FIRST NATIONAL BANK & TRUST COMPANY and
the NATIONAL BANK OF ELLENVILLE



16. The savings accounts in the names of Julius Slutsky or Ben Slutsky and Julius and Alice Slutsky at the Ellenville National Bank, were fully investigated by the government and analyzed by petitioners' accountant.

17. The government never claimed that any of the monies deposited in these accounts were unreported.

The Defense Theory at Trial

18. Defense counsel, at the trial of the petitioners, proceded on the theory that the government was obliged to prove unreported income. In this case there were no missing records and the Nevele's accountant forthrightly testified that all income items were fully and accurately reported. A complete and unimpeachable explanation was given to the Internal Revenue Service about how the Nevele's income was properly recorded.

19. Furthermore, the government was advised that there were many non-income items mixed in with the $8.5 million in checks. The government knew from its own investigation that 72 percent of the checks over $1000 consisted of non-income items.

20. The petitioners had explained to the Internal Revenue Service and during the course of the trial made it plain that a substantial part of the $8.5 million in issue consisted of checks cashed by employees and guests, payments received on behalf of concessionaires, guest rebates and other non-income items. These items were reasonably susceptible of being checked. For example, the Nevele Hotel cashed payroll checks totaling approximately $15,000 a week. In this three year period over a million dollars in payroll checks were deposited in the Nevele accounts. The petitioners maintained

large sums of cash, withdrawn from other accounts, to accomodate these check cashing requirements.

21. On the other hand, if a guest purchased $75.00 worth of clothing in one of the shops on the Nevele premises, this amount would be included in his hotel bill. When he departed, he would pay his hotel bill in full, but the hotel would then disburse $75.00 in cash to the concessionaire after having deposited the full amount in their account. This is an item that would have undoubtedly been under a thousand dollars and should have been deducted from the Nevele's income.

22. When counsel was engaged to prosecute petitioners' appeal to the United States Supreme Court, an investigation of the whole case was imperative for the preparing and filing of an intelligent petition for certiorari. Counsel was mystified over the government's failure to prove the petitioners' failure to report any specific item of income. In other words, no direct evidence was ever presented showing that either of the petitioners failed to report a given item of earned income. Only inferences were drawn by the government from circumstantial evidence which appeared on its face to be consistent with innocence. As a consequence, counsel suggested that Haskins & Sells be engaged to summarize certain cash receipts and cash disbursement entries and certain payroll and disbursement checks for the years 1965 through 1967, the tax years in question.

Attorney's Affirmed Statement.

23. The accounting firm of Haskins & Sells was engaged to summarize certain cash receipts and cash disbursements entries and certain payroll and disbursement checks, in each case as set forth in the reports dated May 8, 1974 delivered by Haskins & Sells to Mr. Jones, copies of which are attached hereto. See page 50.

Cashing of Payroll Checks

24. Over 90 percent of the employees of the Nevele cash their payroll checks at the Nevele Hotel. There is a Paymaster who every week has in his possession each employee's pay check. The number of employees range from 300 during slack season to over 400 during the busy season. The pay days for each week are Sunday and Monday. On those days the employees report to the Paymaster's office located among the main offices of the Nevele Hotel, obtain their check, endorse it, and return it to the Paymaster who disburses their pay in currency and coin. In 1965, 1966 and 1967 the average pay check was less than a hundred dollars.

25. The currency used to cash the employees' pay checks came from an independent, non-income source which relates directly to our newly discovered evidence.

26. In the two day period in which the employees were paid, out of 300 employees, perhaps only 25 would elect not to cash their check through the Paymaster. At the end of each day the Paymaster would take the cashed checks, which were sorted in small bundles of approximately 25 with an adding

machine tape showing the total amount of those checks, wrapped about the group, and would deliver them to the front office where they would be collected. On Monday, Tuesday, or perhaps, Wednesday, these payroll checks would be deposited together with the day's guest receipts.

27. The entries on the deposit slip for the Ellenville National Bank would simply list the totals of the payroll checks, together with groups of checks received from guests in payment of their bills. As an illustration, on the following page is a deposit slip used by the Nevele Hotel for their deposits made in the Ellenville National Bank.

28. It is now apparent that practically all the payroll checks each week were deposited in the Ellenville National Bank and were undistinguished on the deposit slip, and on the bank statements. Since the government only investigated checks deposited over $1,000, all these payroll checks were included in the government's audit as income under their bank deposit theory of prosecution. We will show later in this petition that the currency needed to cash these payroll checks had to be secured from sources other than daily guest receipts and the Nevele funds in the Ellenville National Bank.

29. Through our newly discovered evidence we are able to show the source of that cash and further demonstrate that the currency received in the payment of guest receipts was not utilized to cash the pay checks and was during most weeks inadequate, in any event. Ninety per cent of the guests paid their bills by check so there was rarely enough cash from the guest receipts to cash the payroll checks.

Attorney's Affirmed Statement.

DEPOSITED IN

ELLENVILLE NATIONAL BANK

ELLENVILLE, N. Y.

BY Nevele

7/24 1965

PLEASE FILL IN → YOUR ELECTRONIC CODE NUMBER

PLEASE LIST EACH CHECK SEPARATELY

	DOLLARS	CENTS
CURRENCY	750	
SILVER		
CHECKS AS FOLLOWS		
packs of checks representing payment of guest bills	3,725	18
	2,162	50
	1,823	10
	2,103	80
	1,837	80
	2,314	35
packs of payroll checks deposited	2,003	08
	1,634	52
	2,392	12
	1,939	87
	1,725	30
TOTAL $	24,411	62

(form has been folded to fit on page)

SEE THAT ALL CHECKS AND DRAFTS ARE ENDORSED

Attorney's Affirmed Statement.

30. We will further be able to show and document that there were inadequate funds in the Nevele Hotel bank account at the Ellenville National Bank to draw upon to cash these checks. As a consequence, the cash had to be secured from an outside source, which we will further document, based upon our newly discovered evidence, and will show that it came from a non-income source.

31. On the following page is a schedule prepared by counsel showing, on a monthly basis, the amount of the Nevele payroll checks cashed and deposited in the Nevele checking account at the Ellenville National Bank. Every cent of this money was charged against the petitioners as unreported income.

32. These schedules were prepared by counsel based upon figures taken from the reports supplied by Haskins & Sells annexed hereto. The chart also shows other disbursement checks cashed and deposited in the Nevele checking account and charged against the petitioners as income.

Attorney's Affirmed Statement.

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1965

	Payroll Checks	Other Disbursement Checks
January	$ 26,415	$ 5,768
February	29,440	3,043
March	36,855	6,173
April	32,189	5,218
May	34,406	2,757
June	43,124	5,331
July	40,550	2,347
August	50,673	12,846
September	40,481	14,852
October	40,064	8,632
November	42,699	12,660
December	32,024	5,070
	$ 448,920	$ 84,697

SUMMARY -- 1965

Payroll Checks	$448,920
Other Checks	84,697
Total	$533,617

$399,177.21 Amount charged by government as unreported income

Attorney's Affirmed Statement.

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1966

	Payroll Checks	Other Disbursement Checks
January	$ 37,560	$ 7,488
February	32,053	8,473
March	41,018	5,284
April	37,815	8,328
May	36,439	19,002
June	49,385	3,333
July	45,937	10,197
August	57,571	10,763
September	46,382	10,460
October	41,318	22,785
November	51,713	13,344
December	32,475	4,127
	$ 509,666	$123,584

SUMMARY -- 1966

Payroll Checks	$509,666
Other Checks	123,584
Total	$633,250

$477,910.47 Amount charged by government as unreported income

Attorney's Affirmed Statement.

Nevele Checks Cashed and Deposited
In the Nevele Checking Account

1967

	Payroll Checks	Other Disbursement Checks
January	$ 37,881	$ 21,154
February	37,468	8,752
March	45,749	4,515
April	35,515	15,369
May	45,406	8,275
June	58,979	13,127
July	52,005	6.553
August	62,404	15,740
September	54,688	7,160
October	64,752	14,614
November	51,576	10,127
December	45,326	3,467
	$ 591,749	$128,853

SUMMARY -- 1967

Payroll Checks	$591,749
Other Checks	128,853
Total	$720,602

$354,975.32 Amount charged by government as unreported income

Attorney's Affirmed Statement.

33. As shown by the chart below, the cashing of the Nevele payroll checks and the depositing of them in the Nevele checking account exceeds the tax deficiency charged for each of the years alleged in the indictment. Of course, the total Nevele checks cashed exceeds the unreported income in even a greater amount.

	1965	1966	1967
Total Nevele checks cashed and deposited	533,617	633,250	720,602
Payroll checks cashed and deposited	448,920	509,666	591,749
Alleged unreportec income	399,177.21	477,910.47	354,975.32

34. We are able to conclusively show, through our newly discovered evidence, that these payroll checks, cashed through the use of currency from a non-income source, are responsible for the petitioners' being charged in each of the years in question with unreported income which in reality was not income.

35. We will be able to show in a hearing, through uncontroverted testimony, that the cash proceeds received from guests in payment of their bills, that is payment by currency and coin, which usually consisted of less than 15 percent of a day's receipts, was either deposited or used to pay the concessionaires. The currency and coin received from guests as

payment for their bills was rarely used to cash payroll checks. That is because it was never sufficient in any given week, and it was needed to pay the concessionaires. Currency could not be drawn to meet the payroll cashing requirements from the Nevele bank account because there was never enough surplus funds in that checking account to satisfy these large check-cashing needs.

36. In June of 1965 payroll checks, cashed through the Nevele Hotel, were deposited in the Nevele checking account in the amount of $43,124.08. Only $11,000 in currency and coin was deposited in the Nevele checking account that same month. Furthermore, the bank balance for the Nevele checking account on May 31, 1965 was $20,316.09 and by June 30, 1965 the Nevele checking account was overdrawn in the amount of $12,938.79. These figures prove conclusively that more than $43,000 in currency and coin had to have come from a source other than guest receipts in currency and coin, or from the Nevele checking account. Both of these sources were inadequate to supply the $43,000 in cash. These funds had to have come from an outside source. We are now able to show through our newly discovered evidence a non-income source for the cashing of checks. The funds in the Nevele banking account were used to pay substantial obligations of a current nature, such as food, cleaning, laundry, and other expense items separate from the payroll.

Attorney's Affirmed Statement.

37. The schedules on pages 13, 14 and 15, which are based on uncontroverted evidence, demonstrate conclusively that these payroll checks, cashed and deposited in the Nevele checking account, and charged by the government as income against the petitioners, were clearly non-income items. These amounts which are undisputed and can be fully documented alone account for the tax deficiency charged by the government against the petitioners.

38. We will be able to show and document, by checks and other evidence, sources of money drawn from other enterprises, such as Nevele Acres, Golden Gate-Olcott, Sunspa, and other concerns, which were used of necessity to cash this large amount of payroll checks. The month of June given as an example above is typical, but we will be able to go through each month in the same fashion to show that not only was cash produced from outside, non-income sources, but there were insufficient funds within the Nevele operation to meet these check-cashing needs. As a consequence, based upon the method of proving this tax case, well over a million and a half dollars was charged against the petitioners as income which, we can now reveal to this Court, was clearly not income.

Attorney's Affirmed Statement.

Newly Discovered Evidence

39. While counsel was investigating the Nevele Hotel transactions relating to the taxable years 1965, 1966 and 1967, I accidentally stumbled onto a financial statement of the enterprise called Nevele Acres, dated December 31, 1973, showing an obligation due and owing from the Nevele Hotel to Nevele Acreas in the amount of $1,168,099.48. This entry caught my attention and I immediately investigated this liability of the Nevele Hotel and discovered, for the first time, that large transfers of funds were made from Nevele Acres to the Nevele Hotel for the purpose of cashing payroll checks. As my inquiry continued in this direction, I learned that other companies, unconnected with the Nevele Hotel's operations, furnished funds to the Nevele for the purpose of fulfilling the large cash demands needed to fund the payroll cashing operation. For instance, a company called Golden Gate-Olcott also issued checks payable either to Ben or Julius Slutsky, which were ultimately cashed by them and the currency used to meet the payroll cashing requirements. The same was true of another concern called the Sunspa Resort Hotel.

40. These enterprises are substantial, having income in excess of $2 million for the years in question. However, they, unlike the Nevele, for the most part have a low overhead, small payroll demands, and therefore had funds readily available to meet the payroll cashing needs of the Nevele Hotel. Furthermore, the same principals, i.e.,

Ben and Julius Slutsky, owned these concerns. Therefore, it was no problem to effectuate these transfers when cash was needed.

41. Since Nevele Acres, Golden Gate-Olcott, and the Sunspa are companies unconnected to the operation of the Nevele Hotel, this newly discovered evidence was understandably not uncovered. Nevele Acres, the Sunspa and Golden Gate-Olcott maintain separate sets of books and employed separate accountants. Their books and records were not located at the Nevele Hotel. The Internal Revenue Service never examined the books and records of Nevele Acres, the Sunspa, or Golden Gate-Olcott. As a consequence, anyone investigating the transactions of the Nevele Hotel would not have discovered this critical evidence. The checks were made out, for the most part, to Ben and Julius Slutsky, and cashed by them, and the currency used to meet the Nevele's payroll demands. There was no reason to record the transaction on the books and records of the Nevele. Accordingly, there was no way a person would know of these transfers by examining the Nevele's books and records.

42. As appears in the affidavit of Ben and Julius Slutsky, they had been advised by Louis Bender that the government had no case against them. He had explained to them that they would succeed at trial and consequently they were not made aware of the importance of the payroll cashing operation of the Nevele Hotel. Surely this is understandable in

the prosecution of a complex tax case where the government was proceeding on a bank deposit method of prosecution. It would be unrealistic to expect that Ben and Julius Slutsky, who are not accountants, would anticipate that these transactions would play a critical part in their defense, when they had been advised by their counsel that the government had no case against them. Thus, it is urged that the discovery of this evidence is in all respects new and the failure to learn of this evidence at the time of trial was not due to the defendants' lack of diligence.

43. The Haskins & Sells report, attached at page 50, summarizes, as set forth therein, certain recorded non-income items not included in United States government exhibits. We point out that such non-income items aggregate $470,975.

Attorney's Affirmed Statement.

The Need For a Hearing

44. Although we have conscientiously tried to set forth as much documentation as possible demonstrating the need for a new trial in this case based upon newly discovered evidence and in the interest of justice, it is obviously impossible to include within this petition all our evidence because of the magnitude of this case. In a hearing, we will be able to produce witnesses who will be able to show that there are no omitted items of income. Furthermore, we will be able to explain in great detail how the government erroneously included well over a million and a half dollars in cashed payroll checks and disbursement checks, when in reality this amount was not income and should not have been charged against the petitioners.

45. We will be able to show through witnesses how this check-cashing operation was conducted and that there was never an adequate supply of cash or currency obtained through the payment of guest bills or from the Nevele checking account to meet the payroll check cashing demands. Accordingly, large amounts of cash or currency had to be produced from other sources, which we will prove were not income.

46. A hearing will further show that this evidence was undiscovered during the first trial and that the failure to learn of this evidence is not due to the defendants' lack of diligence. We expect to be able to produce trial counsel used at the first trial and anticipate showing that they had

no knowledge of this evidence and understandably had no reason to search for it. We will be able to verify each and every claim asserted in this application.

I interrupt this affirmation here so that the claims set forth in the affirmation of E. Stewart Jones may be chronologically included.

Attorney's Affirmed Statement.

PART II

Ineffective Assistance of Counsel

E. STEWART JONES affirms and states the following:

49. I am an attorney duly licensed to practice law in the State of New York, with offices at 28 Second Street, Troy, New York, 12181, and I act as co-counsel with HERALD PRICE FAHRINGER in this application. I have been supplied certain facts in this matter concerning the ineffective assistance of counsel in regard to the original trial of the indictment against Ben J. Slutsky and Julius Slutsky. They have urged that an application be made for a new trial based upon the constitutional claim that they have been denied the effective assistance of counsel.

50. After the indictment was filed in this case a demand for a bill of particulars was made and the government stated that the prosecution was based upon the "bank deposits method" of establishing the tax deficiency set forth in the indictment. It is basic and fundamental in the defense of a "bank deposits" prosecution that a comprehensive audit must be conducted of the enterprises in question in order to effectively defend the case. Without a comprehensive audit, the defendants are relegated to the government's audit, which in this case, as we have pointed out earlier in this petition, was indeed misleading, to say the least. Over $218,000 was paid to trial counsel, which included funds for an adequate audit so that the case could be effectively

defended.

51. The petitioners left to their trial counsel the responsibility of obtaining an accountant who would adequately prepare an audit so that the government's prosecution could be justifiably and successfully resisted. Trial counsel hired Nathan Frankel, who was the principal of a small accounting firm located at 225 Broadway, New York, New York, in the same building occupied by counsel.

52. Nathan Frankel never conducted a thorough audit of the Nevele accounts. He was asked the following questions by the prosecution during the course of the petitioners' trial:

> Q. Now, during the course of the almost two-year period which you worked on this case, did you ever analyze the Ellenville checking account in the name of the Nevele?
>
> A. Never did.
>
> Q. And what about the Nevele account at the First National Bank and Trust Company?
>
> A. Not in detail. We scrutinized it in connection with non-income items. (T. 488)*

---

* Refers to trial transcript.

Attorney's Affirmed Statement.

53. The Court then inquired about the nature of this scrutiny, finally stating:

> THE COURT: You mean you didn't trace the deposits and so on?
>
> THE WITNESS: That's right. (T. 490)

54. During the course of the trial the Court, quite understandably inquired as follows:

> THE COURT: Now, where do you show your computations on the bank deposit method?
>
> MR. TIGUE: Government Exhibit 128.
>
> THE COURT: And what [where] is your counter-schedule? The number, if you have one.
>
> MR. KOVE: I don't --
>
> MR. BENDER: We don't have that one.
>
> THE COURT: Are you going to have one?
>
> MR. BENDER: No. (T. 536-537; emphasis supplied.)

55. The Court then inquired of the defense, "What schedule sets forth your contentions?" Defense counsel merely replied that they had only the one schedule drawn up, and the Court suggested that they think about it and let the Court know before it charged the jury.

56. Later the Court again inquired as follows:

> THE COURT: What schedule sets forth your contentions so I can put it to the jury?

I understood he said he can trace everything but $4000. (T. 538)

Defense counsel again replied that they only prepared the one schedule on the savings account.

57. It was inexcusable in a "bank deposits" tax prosecution not to have conducted a comprehensive audit, particularly when there was sufficient resources to finance a thorough audit. The failure to conduct such an audit denied petitioners the effective assistance of counsel and warrants a new trial. We must never allows outselves to become so fascinated with the art of our enterprise that we lose sight of its human goals — justice! There is no way in the world petitioners could have received a fair trial in a tax prosecution of this nature without a comprehensive audit. As a consequence, petitioners have been denied a fair trial. The very least they are entitled to is a new trial.

58. We urge the other grounds contained in the affidavits of Leon Greenberg, Jack McBride, Charles Slutsky, Ben J. Slutsky, and Julius Slutsky, as they relate to the ineffective assistance of counsel as if they were fully set forth in this affirmation. For all these reasons, and those which will be advanced at the time this matter is argued, we urge that a new trial be granted on the grounds the petitioners have been denied the effective assistance of counsel.

Attorney's Affirmed Statement.

Bail Pending Determination of this Motion

59. Petitioners respectfully request that this Court grant bail pending the determination of this motion under this Court's inherent powers and those provisions of §§4141, 4146, and 3148 of Title 18 of the United States Code. It is urged that because of the substantial issues raised in this application clearly pointing to the petitioners' innocence, bail should be granted and/or continued in the interest of justice. Furthermore, it would work a severe hardship on the petitioners if they were confined pending the consideration and determination of this motion. Also, it is imperative that counsel be allowed to continue to confer with the petitioners so that all the necessary evidence essential to sustaining the claims contained in this motion can be gathered. In support of this application we furnish the following information.

Ben J. Slutsky

60. Ben J. Slutsky is 65 years old and suffers from diabetes and coronary insufficiency. In May he was hospitalized with a severe case of hepatitis in the Horton Memorial Hospital in Middletown, New York. He was released from that hospital but suffered a relapse and was readmitted to the same institution for five weeks in August and September of 1973. In November he was readmitted again and was not released until the middle of December. And finally, he had to return to the hospital in January of 1974 for 16 days. Listed below are the dates

of admission and discharge at the Horton Memorial Hospital, Prospect Avenue, Middletown, New York.

Admitted	Discharged	Days Confined
May 20, 1973	June 16, 1973	28
August 31, 1973	September 13, 1973	14
November 29, 1973	December 12, 1973	15
January 13, 1974	January 29, 1974	16
	Total	73

61. The hepatitis which still afflicts Ben Slutsky has been confirmed by Dr. Alexander Richman, Chief of the Liver Disease Section at the Mt. Sinai School of Medicine, New York City. Mr. Slutsky has lost 40 pounds as a result of his prolonged illness, and still suffers from acute hepatitis. Recent liver function tests performed on April 9, 1974, show an increasing abnormality of his liver function. A liver biopsy done during his last hospital confinement showed continuing active hepatitis. Ben Slutsky is on a severely controlled diet and is taking cortisone in order to control the disease. The full report of Dr. Louis A. Lazar is attached confirming and certifying Ben Slutsky's medical condition. He states in that report that Ben Slutsky's "health status is indeed precarious." He further urges, "any change in the ongoing care and attention will tend to seriously jeopardize his health." For these reasons and the others urged in this motion, we appeal to the Court to grant bail pending the determination of these motions.

Attorney's Affirmed Statement.

Julius Slutsky

62. Julius Slutsky is 64 years old and is partially retired. He suffers from a kidney ailment but is not presently hospitalized. Nevertheless, it would impose a terrible hardship upon him to be confined to jail while these motions are before the Court and are being considered. Because of our high expectations of succeeding in this motion for a new trial, we urge most strenuously that the petitioners be allowed bail pending their disposition. There would be absolutely no prejudice to the government, for if we are unsuccessful in these motions, the defendants will ultimately have to pay the penalties fixed by this Court. However, if we succeed, it would be unfair and unjust that the petitioners serve any time in jail, particularly in view of their health and age. Accordingly, as a part of our application, we most respectfully ask that the Court continue the petitioners on their own recognizance pending the determination of these motions.

63. Both petitioners have, since the inception of these proceedings, been released on their own recognizance. They have always appeared at any time in any court when they have been obliged to do so. The government has never questioned their being released on their own recognizance.

64. For all these reasons, and in the interests of justice, it is most respectfully urged that petitioners should be allowed to continue on their own recognizance until these motions are determined and resolved by this Court.

Attorney's Affirmed Statement.

Conclusion

WHEREFORE, it is respectfully requested the Court grant a new trial for the petitioners based upon newly discovered evidence and in the interests of justice, and because the petitioners were denied the effective assistance of counsel, or in the alternative, a hearing be conducted so that these claims can be fully investigated and further verified by witnesses, documents, and other proof available for submission to this Court, and that this Court grant bail pending the determination of this motion by continuing the Petitioners on their own recognizance and granting such other and further relief as is just under all the circumstances.

E. Stewart Jones, Esq.

Herald Price Fahringer, Esq.

Dated: May 17, 1974

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SULLIVAN)

JOHN S. MCBRIDE, being duly sworn deposes and says:

1. That I am an attorney at law, duly admitted to practice in the State of New York and have offices for the general practice of law at Ten Hamilton Avenue, Monticello, New York.

2. I have been a long-time acquaintance of the defendants Ben J. and Julius Slutsky and have for the past five years been a close associate and friend of Charles A. Slutsky, son of the defendant Ben J. Slutsky. During the course of the criminal prosecution against the defendants Ben J. and Julius Slutsky, I followed the case as a casual observer and on numerous occations discussed the matter, as a friend, with the defendants Ben J. and Julius Slutsky, was well as with Charles A. Slutsky.

3. Following the defendants' conviction on January 9, 1973, I requested permission of the defendants to obtain and review a transcript of the trial proceedings and thereafter conducted, on my own and without request of the defendants, a minimal amount of research into the issues raised by the indictment and the issues raised during the course of the trial.

4. After my review of the record and research, I discussed with Charles A. Slutsky the appeal and my opinions in connection therewith and Charles A. Slutsky suggested that I attend with him a

meeting with Mr. Bender.

6. On April 5, 1973, Charles A. Slutsky, Leon Greenberg and your deponent, went to the office of Mr. Louis Bender in New York City and met with Mr. Bender, and his Associate, Sandor Frankel. At that time, and in response to questions by Mr. Greenberg, Mr. Bender indicated that he intended to raise on the appeal five points and indicated that he felt these contentions were meritorious and would be successful. Following Mr. Bender's presentation, Mr. Greenberg asked Mr. Bender if it would be permissible, for me, as a friend of the defendants' family, to ask Mr. Bender a few questions.

7. After discussing briefly our disagreement with respect to the points on appeal, I asked Mr. Bender, in substance, the following questions:

> "Mr. Bender, would you agree with me that in connection with a bank deposit theory of indictment, that the only possible successful defense must include a comprehensive audit of all bank accounts included in the Government case?"
>
> To this inquiry, Mr. Bender responded--that he did agree with that statement.
>
> The next question I asked Mr. Bender was--"Did you conduct a comprehensive audit of all of the bank accounts involved in the Government case?"--
>
> Mr. Bender responded that he did not.

Attorney's Affirmed Statement.

I then asked Mr. Bender--"Why not?"--

To this Mr. Bender responded--"I was afraid that if we conducted a comprehensive audit it would show more than the Goverament claim."--

I then said, in substance, --"I do not see how you would know that without conducting the audit--in other words, what you are telling me is that you defended this case on the theory that your client was guilty?"--

To this statement Mr. Bender responded--"Yes"--

The meeting was then adjourned.

8. The aforesaid series of questions and answers were followed by some general discussion concerning the case and then the meeting terminated shortly thereafter.

John S. McBride

JOHN S. MCBRIDE

Sworn to before me this

4th day of May 1974.

Catherine McCullough

[illegible]

[illegible] 76

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SULLIVAN)

LEON GREENBERG, being duly sworn deposes and says:

1. That I am an attorney at law, duly admitted to practice in the State of New York, but for the past ten years have been primarily engaged in business enterprises and not actively engaged in the practice of law.

2. For the past twenty years, I have been a close personal friend of both defendants Ben J. Slutsky and Julius Slutsky. My relationship with them being akin to that of a member of their family.

3. During the course of the original Internal Revenue Service investigation, the indictment and their trial, I frequently met with both defendants and discussed the investigation and litigation and at their request and in the capacity of a friend, accompanied them to meetings which they had with their respective counsel and was privy to many of the concersations held between the defendants and their counsel Messrs. Louis Bender and Moses L. Kove.

4. One of the many meetings that I attended took place April 5, 1973 in the office of Mr. Louis Bender in New York City. This meeting was held after the conviction and imposition of sentence of the defendants and was attended by myself, Charles A. Slutsky, son of defendant Benjamin J. Slutsky, John S. McBride, Louis Bender and an Associate of Mr. Bender, Sandor Frankel, Esq.

5. At the aforesaid meeting a general discussion was held

with respect to the points that Mr. Bender intended to raise upon appeal following which Mr. McBride engaged in a question and answer exchange with Mr. Bender concerning the theory of defense.

6. I have read Mr. McBride's affidavit and my recollection in substance is in accord with the statements set forth in this affidavit. To wit:

> "Mr. Bender, would you agree with me that in connection with a bank deposit theory of indictment, that the only possible successful defense must include a comprehensive audit of all bank accounts included in the Government case?"
>
> To this inquiry, Mr. Bender responded--that he did agree with that statement.
>
> The next question I asked Mr. Bender was -- "Did you conduct a comprehensive audit of all of the bank accounts involved in the Government case?"--
>
> Mr. Bender responded that he did not.
>
> I then asked Mr. Bender--"Why not?"--
>
> To this Mr. Bender responded--"I was afraid that if we conducted a comprehensive audit it would show more than the Government claim."--
>
> I then said, in substance, --"I do not see how you would know that without conducting the audit--in other words, what you are telling me is that you defended this case on the theory that your client was guilty?"--

To this statement Mr. Bender responded--"Yes"--

The meeting was then adjourned.

7. The statement made by Mr. Bender at the April 5, 1973 meeting above-referred to was in direct contradiction and conflict with statements made by Mr. Bender and Mr. Kove in the presence of defendants Ben J. Slutsky and Julius Slutsky at meetings which I attended during the investigation, indictment and trial.

8. I attended the initial meeting to retain counsel in this matter at the office of Moses L. Kove in the City of New York. In the late Fall or early Winter of 1969, Mr. Kove undertook the representation of both defendants for some period of time and then in the Spring of 1971, or some time thereafter, at the suggestion of Mr. Kove, additional counsel in the person of Louis Bender was hired to continue with the representation of Ben J. Slutsky, with Mr. Kove thereafter representing only Julius Slutsky.

9. Deponent appeared with Ben J. Slutsky and/or Julius Slutsky at almost every meeting with Mr. Bender and Mr. Kove. These meetings took place with counsel both in New York City and in Ellenville, N.Y. The information required by defense counsel was solicited from both defendants. After the information was submitted to both Mr. Kove and Mr. Bender, and shortly after Mr. Bender's retainer, he suggested that an accountant be retained to do an audit of their books.

As information was brought to the attention of counsel, both

Attorney's Affirmed Statement.

Mr. Bender and Mr. Kove assured both Ben J. Slutsky and Julius Slutsky at all times, that they had a valid defense to all the Government allegations, and, based on the information they had obtained, the allegations could be properly explained.

In addition to the information adduced by Mr. Frankel, Mr. Bender required a considerable amount of information of a specific nature from Charles A. Slutsky, the bookkeeper and the Comptroller in Ellenville.

10. On one occasion, in the absence of both defendants, I discussed with Mr. Bender and Mr. Kove the different positions of the two defendants and its affect upon the defense of the action, namely, that Ben J. Slutsky had been for all practical purposes retired from actively participating in the business for some ten years and Julius Slutsky had been actively engaged in the day-to-day management of the business during the time referred to in the indictment. Considering the aforesaid, I inquired as to the possibility of separate approaches to the defense of the respective defendants. This suggestion was summarily dismissed by counsel for both defendants and counsel for both defendants stated that both defendants had good and complete legal defense.

LEON GREENBERG

Sworn to before me this

_____ day of May 1974.

NOTARY PUBLIC

Notary Public, State of New York
Qual. in Orange County
Comm. Expires March 30, 1976

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SULLIVAN)

BEN J. SLUTSKY, being duly sworn deposes and says:

1. That he is one of the defendants in the within matter.

2. That there came a time in the year 1969 when the Nevele Hotel, in which I and my brother Julius are co-partners, underwent an investigation by the Internal Revenue Service when we were advised that the case had been referred to a Special Agent.

We sought counsel and engaged the services of one Moses Kove in New York City.

3. When we originally engaged Mr. Kove, both my brother and I advised Mr. Kove that we were unaware of any violation of the Internal Revenue Service on our part within the hotel and/or business operations and further advised Mr. Kove that the accounting procedures, followed at the hotel, were those as outlined by our accountants. That neither my brother or I took any active participation in the preparation of our business or personal tax returns, but that we left that matter solely within the purview of our accountant. We both advised Mr. Kove that to our knowledge all of the income, both business and personal, had been properly recorded, reported and the taxes paid thereon.

4. Some time in early 1970, Mr. Kove suggested that additional counsel be retained in the person of Louis Bender, Esq., who was an attorney occupying an office in the suite occupied by Mr. Kove. It was

at that time determined that Mr. Kove would continue to represent Julius Slutsky and Mr. Bender would undertake to represent me.

While separate counsel was retained for appearance purposes, throughout the course of the investigation, and up to, and through the course of the trial, both counsel collaborated with both my brother and I and it was in fact, and in effect, a joint effort. This extended to engaging a single accountant on behalf of both my brother and myself in the person of Mr. Nat Frankel to conduct whatever accounting work was necessary in connection with the defense of myself and my brother. Both attorneys were present at all meetings held with either myself or my brother up to, and including the time of trial. At no time during the course of the investigation, indictment, or trial of this action did I ever tell Mr. Bender of Mr. Kove that I was guilty of any wrongdoings, or that I had any knowledge of the handling of any funds in the Nevele Hotel business acount or in my personal account, that was not properly reported and the taxes paid thereon. Neither my brother nor I gave any direction to Mr. Frankel with respect to the nature or extent of his accounting work nor did I know, nor was I advised as to what he had been instructed to do or the extent of the work that he was doing.

5. I repeatedly told both counsels that I did not understand the Government's position or the nature of the charges against me or how they could have occurred. Mr. Bender and Mr. Kove advised me that Mr. Frankel, the accountant that they engaged was conducting an investigation of our records in preparation for our defense which began in 1971 and continued up to, and through the time of the trial.

6. During the course of our meetings, Mr. Bender and Mr. Kove

Attorney's Affirmed Statement.

repeatedly made statements to my brother and I to the effect that --"your records are perfect"--"we have a triable defense"--"the Government doesn't have a good case". At one meeting shortly before the trial, Mr. Leon Greenberg brought up the subject of disposition by plea at which time Mr. Bender, in the presence of Mr. Kove, stated --"we've got plenty of time for that"--Mr. Greenberg continued by saying --"Ben must get this nightmare over because of his health"-- to which Mr. Kove replied "the Government will take any plea in a minute-- don't worry about that"--.

7. From the time of Mr. Kove's engagement in late 1969 up to 1973, I and my brother paid to Mr. Kove and Mr. Bender (including accounting fees paid to Mr. Frankel), over $218,000.00.

8. On April 5, 1973, I was advised by my son Charles A. Slutsky that he had attended a meeting in New York City at the office of Mr. Bender at which time during the course of a discussion between Mr. Bender and John S. McBride, Mr. Bender indicated that he had prepared the defense of my action on the theory that I was guilty. At no time during the course of my association with Mr. Bender from the time of his retention to the time of my sentencing did Mr. Bender ever indicate to me that any statements that I made to him or any part of the investigation indicated any guilt or violation of law on my part.

Ben J. Slutsky
BEN J. SLUTSKY

Sworn to before me
this 4 day of May 1974.

Celia M. Cullough
NOTARY PUBLIC

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SULLIVAN)

JULIUS SLUTSKY, being duly sworn deposes and says:

1. That he is one of the defendants in the within matter.

2. That I have read the affidavit prepared by my brother Ben J. Slutsky and concur with the content thereof.

3. I never, at any time indicated, either to Mr. Kove or Mr. Bender that I was in any way guilty of any wrongdoings or violations of law, nor did I indicate at any time that I had any knowledge of any improper accounting procedures followed in the operation of our business or with respect to mine and my wife's personal accounts.

4. I was present at meetings with both Mr. Kove and Mr. Bender throughout the investigation, prior to and during the trial when we were continuously reassured that the Government did not have a good case and that Mr. Bender and Mr. Kove and the accountant Mr. Frankel had prepared a complete defense to the charges.

5. I did not have any knowledge of Mr. Bender's position that the defense prepared by him and Mr. Kove was based upon the assumption that my brother and I were guilty before April 5, 1973 when my nephew, Charles A. Slutsky advised me as to the discussions which had taken place in Mr. Bender's office on that day.

Attorney's Affirmed Statement.

JULIUS SLUTSKY)

Sworn to before me this

4 day of May 1974.

Robert W. Cullough
NOTARY PUBLIC

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF SULLIVAN)

CHARLES A. SLUTSKY, being duly sworn deposes and says:

1. That I reside in Ellenville, Ulster County, New York and am the son of the defendant Benjamin J. Slutsky.

2. I was present at the meeting in the office of Louis Bender, Esq. on April 5, 1973, attended by myself, Leon Greenberg, John S. McBride, and Sandor Frankel, Esq.

3. I read the affidavit of John S. McBride concerning the question and answer portion of that meeting between Mr. McBride and Mr. Bender and the recollection as set forth in Mr. McBride's affidavit, are in accordance with my recollection of the statements made at that time, To wit:

> "Mr. Bender, would you agree with me that in connection with a bank deposit theory of indictment, that the only possible successful defense must include a comprehensive audit of all bank accounts included in the Government case?"
>
> To this inquiry, Mr. Bender responded--that he did agree with that statement.
>
> The next question I asked Mr. Bender was--"Did you conduct a comprehensive audit of all of the bank

accounts included in the Government case?"--

Mr. Bender responded that he did not.

I then asked Mr. Bender--"Why not?"--

To this Mr. Bender responded--"I was afraid that if we conducted a comprehensive audit it would show more than the Government claim."--

I then said, in substance, --"I do not see how you would know that without conducting the audit--in other words, what you are telling me is that you defended this case on the theory that your client was guilty?"--

To this statement Mr. Bender responded--"Yes"--

The meeting was then adjourned.

4. In addition I was present in New York City during the course of the trial and on one occasion was in the presence of my father, Ben J. Slutsky, my uncle Julius Slutsky, Leon Greenberg, Mr. Bender and Mr. Kove at the Drake Hotel. As they were discussing the conduct of the trial during the course of that day, my father was expressing concern over the progress of the trial and I hear Mr. Bender tell my father "you didn't do anything wrong--you don't have anything to worry about"--.

CHARLES A. SLUTSKY

Sworn to before me this

4th day of May 1974.

NOTARY PUBLIC

My Commission Expires: 3-30-76

Attorney's Affirmed Statement.

LOUIS A. LAZAR, M. D., F.A.C.P., F.A.C.C.
27-31 RIDGE STREET
MIDDLETOWN, NEW YORK
10940

(914) 343-0515

30 April, 1974

Harold Price Fabringer, Esq.
One Niagra Square
Buffalo, New York
14202

REF: BEN SLUTSKY
THE NEVELE
ELLENVILLE, N.Y.

Dear Mr. Fabringer:

Mr. Slutsky has asked that I submit to you a full report of his current health problems, treatment, prognosis, and a projection of his long-range health problems which may be related to the active problems now under treatment by me.

CURRENT MEDICAL HISTORY:

Mr. Slutsky's current health problems are an outgrowth of an attack of type B Hepatitis which first presented in May of 1973. HE BECAME ACUTELY AND VIOLENTLY ILL WITH THIS DISEASE AT THAT TIME. It has resulted in FOUR periods of hospitalization at the Horton Hospital in Middletown, New York, some of which have been prolonged. A supplemental listing of his periods of hospitalization will be appended to this communication. In addition, he was hospitalized once in Florida during this period of illness because of uncontrolled diabetes provoked by Cortisone treatment required for the control of his hepatitis.

The diagnosis of hepatitis (type B) was established by laboratory testing and liver biopsy. This diagnosis was also substantiated in consultation with Dr. Alexander Richman, Chief of the Liver Disease Section at

REF: BEN SLUTSKY

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the Mount Sinai School of Medicine, New York City. Mr. Slutsky was severely jaundiced and semi-stuporus on the occasion of his first hospitalization. Because of evidence of deepening jaundice and imminent liver failure, it became necessary to treat Mr. Slutsky with high doses of Cortisone in order to save his life. His hepatitis became partially controlled, but a pre-existing diabetes mellitus became markedly intensified. Ultimately his hepatitis became less intense, but his diabetes became a management problem. He lost about forty pounds of weight during this period of illness. As previously indicated, while attempting to convalesce in Florida on one occasion hospitalization for uncontrolled diabetes was required.

It is important to emphasize that this disease remains active. RECENT LIVER FUNCTION TESTS DONE ON 9 APRIL, 1974 SHOW AN INCREASING ABNORMALITY OF HIS LIVER FUNCTION ONCE AGAIN. ANOTHER LIVER BIOPSY (DONE AT THE TIME OF HIS LAST HORTON HOSPITAL ADMISSION) SHOWED CONTINUING ACTIVE HEPATITIS.

The PROGNOSIS of his problems with respect to both his now chronic active hepatitis and diabetes mellitus is very guarded. This form of prolonged active hepatitis is unusual and requires constant ongoing medical care, relief from all physical and mental stress humanly achievable, and special attention to diet. This is complicated further by the marked variations in his diabetes occasioned by the necessity to use Cortisone in varying doses to keep his hepatitis from becoming intense again.

It is my firm clinical judgement that Mr. Slutsky's health status is indeed precarious. Any change in the ongoing care and attention will tend to seriously jeopardise his health. He must have a combination of prolonged rest, specific and variable diet therapy which will of necessity change with the circumstances of his hepatitis and diabetes; continuing specialized medical care and judgement. The potential for liver failure, cirrhosis, complicating secondary infection

REF: BEN SLUTSKY

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additional complications relating to variations in the intensity of his diabetes (already documented to be a significant and highly variable problem) are all real and threatening.

In addition to these ongoing active major problems, Mr. Slutsky has active gout, and a tendency to cardiac arrhythmias and mild coronary insufficiency symptoms. Treatment of his gout has been limited because it has been demonstrated that drug therapy intended to lower his uric acid levels (the abnormal chemical in gout) has resulted in aggravation of his hepatitis. Prior to his hepatitis problem, he had no problems in the use of these drugs.

SUMMARY:

I CONSIDER MR. SLUTSKY TO BE ACTIVELY AND SERIOUSLY ILL. I am aware of his current legal problems and the projected disposition of these problems in the court decision handed down. It is my FIRM MEDICAL OPINION that the implementation of this sentence will doubtless result in a serious down-turn in the health of Mr. Slutsky based on all of the objective evidence and clinical experience on record since the onset of his hepatitis problem. I have no doubt that should the sentence be implemented, a threat to his life is a serious possibility - and failing that - many serious complications are likely to occur.

I would therefore urge that consideration of these serious matters relating to his health be given every priority in determining the disposition of the problems now before the court.

Respectfully submitted,

LAL:els

LOUIS A. LAZAR, M. D.

Attorney's Affirmed Statement.

ADDENDUM

REF: BEN SLUTSKY

DATES OF HOSPITALIZATION AT

HORTON MEMORIAL HOSPITAL
PROSPECT AVENUE
MIDDLETOWN, NEW YORK
10940

Admitted	Discharged
20 May, 1973	16 June, 1973
31 August, 1973	13 September, 1973
29 November, 1973	12 December, 1973
13 January, 1974	29 January, 1974

Attorney's Affirmed Statement.

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

550 BROAD STREET
NEWARK, NEW JERSEY 07102

May 8, 1974

E. Stewart Jones, Esq.
28 Second Street
Troy, New York 12181

Dear Mr. Jones:

In accordance with your request, we have prepared the summary set forth below of certain payroll and general disbursement checks represented to have cleared "The Nevele" checking accounts at Ellenville National Bank and First National Bank and Trust Company of Ellenville during the years ended December 31, 1965, 1966, and 1967 that bore a certain stamp as described in (2) in the following paragraph.

In the preparation of this summary, we have performed only the following:

(1) received, from Mr. Charles Slutsky, certain payroll and general disbursement checks represented by him to have cleared the above bank accounts during the thirty-six months ended December 31, 1967;

(2) ascertained those checks that bore a stamp for deposit only, which stamp included multiple names, among which were "The Nevele", "Nevele Hotel", "Nevele Country Club", "Ben J. Slutsky", and "Julius Slutsky"; and

(3) accumulated the amounts of those checks referred to in (2) above by month, based on the month the checks were represented to us by Mr. Charles Slutsky to have cleared the banks, and entered the totals on the following summary:

Attorney's Affirmed Statement.

	1965	1966	1967
Payroll Checks:			
January	$ 26,415	$ 37,560	$ 37,881
February	29,440	32,053	37,468
March	36,855	41,018	45,749
April	32,189	37,815	35,515
May	34,406	36,439	45,406
June	43,124	49,385	58,979
July	40,550	45,937	52,005
August	50,673	57,571	62,404
September	40,481	46,382	54,688
October	40,084	41,318	64,752
November	42,699	51,713	51,576
December	32,024	32,475	45,326
Total	448,920	503,666	591,749
General Disbursement Checks:			
January	5,768	7,488	21,154
February	3,043	8,473	8,752
March	6,173	5,284	4,515
April	5,218	8,328	15,369
May	2,757	19,002	8,275
June	5,331	3,333	13,127
July	2,347	10,197	6,553
August	12,846	10,763	15,740
September	14,852	10,460	7,160
October	8,632	22,785	14,614
November	12,660	13,344	10,127
December	5,070	4,127	3,467
Total	84,697	123,584	128,853
Total All Disbursement Checks	$533,617	$633,250	$720,602

We have not examined any financial statements of The Nevele Country Club as of any date or for any period, and accordingly we express no opinion concerning any such financial statements.

Yours truly,

Haskins & Sells

Attorney's Affirmed Statement.

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

550 BROAD STREET
NEWARK, NEW JERSEY 07102

May 8, 1974

E. Stewart Jones, Esq.
28 Second Street
Troy, New York 12181

Dear Mr. Jones:

In accordance with your request, we have (1) summarized the amounts of the cash receipts entries not credited to income accounts and the cash disbursements entries that reduced, or would reduce, recorded income, both as entered in the general ledger of The Nevele Country Club for the years ended December 31, 1965, 1966, and 1967, (2) compared such summary with the amounts of "non-income items" shown in United States Government Exhibits 100 through 108, inclusive, relating to United States vs. Ben J. Slutsky and Julius Slutsky, d/b/a The Nevele, which exhibits were made available to us by Mr. Charles Slutsky, and (3) indicated the resulting differences on the attached Summary of Recorded Non-Income Items Not Included in the United States Government Exhibits 100 Through 108, Inclusive, for the years ended December 31, 1965, 1966, and 1967. Such cash receipts entries, cash disbursements entries, and the amounts presented in the Summary of Recorded Non-Income Items Not Included in the United States Government Exhibits 100 Through 108, Inclusive, were not audited or verified by us, and accordingly we do not express any opinion on them.

We have not examined any financial statements of The Nevele Country Club as of any date or for any period, and accordingly we express no opinion concerning any such financial statements.

Yours truly,

Haskins & Sells

Attorney's Affirmed Statement.

THE NEVELE COUNTRY CLUB

SUMMARY OF RECORDED NON-INCOME ITEMS
NOT INCLUDED IN THE UNITED STATES GOVERNMENT
EXHIBITS 100 THROUGH 108, INCLUSIVE,
FOR THE YEARS ENDED DECEMBER 31, 1965, 1966, AND 1967
(UNAUDITED AND UNVERIFIED)

	1965	1966	1967
Taxes (Note 2).....	$24,176	$ 70,457	$ 75,270
Reduction of notes and loans receivable (Note 3).....	375	13,715	2,077
Guest income returns (Note 4).....	21,803	25,633	31,729
Reductions of income (Note 5).....	6,489	13,907	23,766
Credits to expense accounts (Note 6):			
Wages.....	763		
Payroll taxes and expenses.....	208	2,392	2,894
Food.....	136	1	5
Supplies.....		249	192
Operating expenses.....	3,237	4,717	4,345
Promotional expenses.....	292	1,428	553
Insurance.....	1,160	5,245	
Repairs and maintenance.....	200	750	1,016
General and administrative expenses.....	2,941	6,726	9,932
Credits to exchange account (Note 7).....	14,300	9,177	18,815
Credits to capital accounts (Note 8).....	9,904	25,000	35,000
Total.....	$85,984	$179,397	$205,594

NOTES:

1. This summary includes those items which have come to our attention to May 8, 1974 and does not necessarily represent all such items which may exist.

2. These amounts represent cash receipts entries credited to the general ledger expense account "taxes" in 1965 (including $6,542 transferred by journal entry) and credited to the general ledger liability account for taxes in 1966 and 1967.

(Continued) - 1.

Attorney's Affirmed Statement.

3. These amounts represent cash receipts entries credited to the general ledger account for notes and loans receivable.

4. These amounts represent cash disbursements entries charged to the general ledger account for returns to guests.

5. These amounts represent cash disbursements entries charged to the income acccunt in the general ledger, including journal entry charges of $209 in 1966 and $2,314 in 1967 and less a journal entry credit of $151 in 1965.

6. These amounts represent cash receipts entries credited to the indicated expense accounts in the general ledger.

7. These amounts represent the excess of cash receipts entries credited to the general ledger account for exchanges over the amounts included in United States Government Exhibits 106, 107, and 108.

8. These amounts represent the excess of cash receipts entries credited to capital accounts in the general ledger over the amounts included in United States Government Exhibits 106, 107, and 108.

(Concluded) - 2.

Government's Affidavit in Opposition.

:CT:lq

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- v - : AFFIDAVIT

BEN J. SLUTSKY and JULIUS SLUTSKY, d/b/a "THE NEVELE", : 72 Cr. 1255 (LFT)

Defendants. :

- - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

LAWRENCE S. FELD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and am in charge of the above-entitled case. This affidavit is submitted in opposition to the motions of defendants Ben J. Slutsky and Julius Slutsky for a new trial or, in the alternative, for a hearing to present "newly discovered evidence" and for bail pending the outcome of this motion. For the reasons hereinafter set forth and in the accompanying memorandum of law, the Government submits that these motions are wholly without merit and should be denied.

Motion for a New Trial

2. Having exhausted all available avenues of the appellate process*, the defendants now seek a new trial

* The appellate history of this case is summarized in the moving papers (Ehringer Statement, pp. 2-3). In addition, it should be noted that defendants' petition for a rehearing filed in the United States Supreme Court was denied on May 14, 1974 (42 U.S.L.W. 3681).

alleging that they are in possession of newly discovered evidence which establishes their innocence and that the decision of trial counsel for defendant Ben J. Slutsky not to investigate and present this evidence at trial denied both defendants their right to the effective assistance of counsel. But the motion papers submitted by the defense not only fail to reveal any evidentiary facts which require a new trial, but also clearly establish that whatever evidence the defense claims it has is by no stretch of the imagination "newly discovered".

3. The proof at trial established that the defendants had unreported income of approximately $1,232,000 during 1965, 1966 and 1967. The defendants claim that of the $8.5 million in checks under $1,000 deposited during the three year period in the Nevele checking accounts at the First National Bank and Trust Company of Ellenville and the Ellenville National Bank, $1,888,000 consisted of payroll and other checks which had been cashed at the Nevele through the use of currency obtained from a non-income source (Fahringer Statement, p. 16) and hence was improperly charged as income.

4. This argument is far from new. In fact, it was twice presented to the Court of Appeals and twice rejected. The brief filed on behalf of Ben J. Slutsky in the Court of Appeals states, in relevant part:

> "A possible indication of the non-income source of these huge unidentified deposits are the following examples: the cashing of approximately $2,300,000 in payroll checks deposited in the Nevele checking accounts in the three years at issue, which cash came from receipts, or cash on hand, or Nevele checks cashed at these banks for that purpose (A217a); the frequent deposits to the same accounts of customers' checks that were voided where the cash was obtained from the Nevele safe (A398a); guest income rebates on guest receipts where the income was netted

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> on the Nevele books; corresponding payments in cash from customers paid out by the Nevele to concessionaires which were not charged to an expense account on the [illegible] checks [illegible] out by the Nevele for Blue Cross and garnishments in salaries." (Brief at 13n.).

The petition for rehearing and hearing en banc (at 14) repeated the claim and emphasized that $2.3 million in payroll checks were included in the unidentified deposits which the Government proved was income:

> "[P]ayroll checks under $1,000 of approximately $2,300,000 in the three years in issue were cashed and deposited in these two Nevele checking accounts, an amount twice the amount of the alleged excess deposits. Other checks that were cashed and amounts rebated, all of which were charged up improperly as income, have been set forth in appellant Ben Slutsky's main brief at page, 13 footnote."

5. Furthermore, the cashing of payroll checks was the subject matter of testimony at trial. Samual Levis, the accountant for the Nevele, testified that during the years 1965, 1966 and 1967 the Nevele had approximately 300 employees and that $15,000 - $18,000 per week was kept for payroll purposes. He further testified that cash also was kept to cash checks for guests (Tr. 178-179). According to Levis, the cash that was used to pay the Nevele's employees came from "checks that [were] cashed for that particular purpose or from guest income" (Tr. 128).

6. The only aspect to the argument concerning the cashing of payroll checks advanced in the present motion which has not already been fully ventilated is the allegation that the defendants are now able to identify the source of the cash as coming from three other enterprises (Nevele Acres,

Golden-Gate Olcott and the Fairmont) which they owned during the period. It is further alleged that this cash was not income earned by the defendants. The moving papers, however, provide no evidentiary facts to support these allegations. The defense has not demonstrated that one cent of the over $1.5 million in cash used to cash employee's checks came from a specific non-income source. Nor do they persuasively demonstrate that the alleged evidence was not known by the defense or readily available to it either before or during the trial; in fact, they show that the contrary is the case.

7. Defense counsel alleges that the checks were issued by these three enterprises to Ben and Julius Slutsky, that these checks were cashed by them and that the currency was used to meet the Nevele's payroll needs (Fahringer Statement, p. 20 at ¶41). Assuming arguendo the truth of this claim, it is obvious that this information was known to the defendants both before and during the trial. Furthermore, the books and records of these three enterprises were available to the defense, which had exclusive control over them during that period. Since such huge sums of money were allegedly involved, it can hardly be argued that these substantial transfers of cash were inadvertently overlooked by both defendants during the investigation of this case, the pre-trial proceedings and the trial itself. Yet this is precisely the explanation offered in the moving papers; since Mr. Lender allegedly told the defendants that the Government had no case against them, it is argued that "they were not made aware of the importance of the payroll cashing operation of the Nevele Hotel." (Fahringer Statement, p. 20, at ¶41).

8. It simply defies credulity that experienced, mature men like Ben and Julius Slutsky, whose intelligence and business acumen made them so enormously successful, could

have ignored the significance of the [illegible] and their own central role in the flow of [illegible] of alleged non-income cash from their other [illegible] to the Nevele. The defendants sat through the trial and listened to the testimony of Samuel Levis, their accountant, recited above, concerning the "substantial amount of cash kept at the hotel premises" (Tr. 178). They listened to the testimony of Nathan Frankel, the accountant whom they retained after the investigation commenced, with respect to the analysis he performed concerning the elimination of non-income deposits, including "interbank transfers", "exchanges", "loans", "contributions to capital" and all other items "that would be non-income . . ." (Tr. 498). Furthermore, during the almost two year period in which Frankel investigated the case, his staff consulted with defendant Julius Slutsky (Tr. 496). In the face of all this, it is patently frivolous to assert, as the defense does now, that "this evidence is in all respects new and the failure to learn of this evidence at the time of trial was not due to the defendants' lack of diligence." (Fahringer Statement, p. 21, ¶42).

9. While the moving papers are lengthy, the allegations concerning the "newly discovered evidence" relating to the source of the cash for the payroll checks are sketchy at best, and are based entirely upon hearsay statements of counsel set forth in "affirmations" and not under oath. There is absolutely no showing, by documentary evidence or otherwise, that any of the currency used to cash a single payroll check came from any of the Slutsky's other enterprises and that the money was not income. Instead, this Court is asked to order a hearing based upon the wholly undocumented conclusory assurances of counsel that such proof exists. Such assurances, however, are no substitute for the kind of

concrete factual demonstration necessary to warrant the exercise of this Court's discretion in ordering a hearing. Indeed, the vagueness and lack of specificity which characterize the defense allegations precludes even an attempt at rebuttal.

10. In this connection, it is noteworthy that while the moving papers include affidavits from Ben J. and Julius Slutsky, neither of these affidavits refers to the cashing of payroll checks or the allegation that the cash used therefor came from their other enterprises and was not income. This omission is particularly significant when considered in light of the defense contention that the checks issued by these other enterprises were made "payable to either Ben or Julius Slutsky" and "were ultimately cashed by them". (Fahringer Statement, p. 20 at ¶41). The absence of any sworn statements from the defendants themselves regarding this matter reveals the lack of substance to the claim and demonstrates the utter failure to satisfy their burden of showing the need for a hearing.

11. The second aspect of the claim of "newly discovered evidence" relates to a report prepared by the accounting firm of Haskins & Sells which purports to show that certain non-income items totalling $470,975 and recorded on the books and records of the Nevele were not included in Government Exhibits 100 through 108. The report of Haskins & Sells expressly states that the amounts presented therein "were not audited or verified" by that firm and that it does "not express any opinion on them".

12. This report is inaccurate and misleading in at least two respects. First, while the report states that guest income returns for 1965 ($21,902.60) and 1966 ($25,632.50) were not eliminated by the Government as a non-income item, Government Exhibit 127 (a copy of which is

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annexed hereto) plainly shows that these items, totalling $47,436, were in fact eliminated. The report also ignores the fact that the Government credited the defendants with an additional $189,879 in non-income deposits based upon representations made by Mr. Bender to members of the Department of Justice at a conference on January 12, 1972. These facts were the subject of a stipulation at trial (Tr. 266-67) and are reflected on Government Exhibit 127. Thus the total of the guest returns of $47,436 and the $189,879 in other eliminations ("leads") increased the total non-income items discovered in the Nevele's books during the audit by $237,315. Accordingly, at the least, the Haskins & Sells figure of $470,975 must be reduced by $237,315 to accurately reflect the full amount of eliminations with which the Government credited the defendants at trial.* Even assuming arguendo that the unverified and unaudited amounts contained in the report accurately represent non-income items, the balance of $233,360 does not reduce the $1,232,000 in unreported income proven at trial by an amount which probably would have resulted in a verdict of acquittal.

13. There are several other matters relating to the Haskins & Sells report which merit comment. To the extent, if any, that there were non-income items reflected on the Nevele's books and records which the Government failed to consider, that omission is directly attributable to the defendants' refusal to permit inspection of those books and records. United States v. Slutsky, 352 F.Supp. 1105, 1108 (S.D.N.Y. 1972), aff'd, 487 F.2d 832, 843 n.15 (2d Cir. 1973). However, it is undisputed that Nathan Pranikel and his staff of eight had access to these books and records for two years.

* The non-income eliminations reflected on Government Exhibit 127 are carried forward on Government Exhibit 128 which contains the schedule of unreported income received by the defendants during 1965, 1966 and 1967. A copy of Government Exhibit 128 is annexed hereto.

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Frankel performed an analysis which, as he testified at trial, extracted all the non-income items reflected on the books made available to him. Furthermore, the Government's allowance for non-income deposits exceeded the amount computed by Mr. Frankel by $63,000 even though his figures were based upon an examination of the books and records to which the Government had been denied access (Tr. 506). The fact that Haskins & Sells might have found some additional non-income items had they been retained instead of Frankel is surely no ground for granting the defendants a new trial. In sum, all of the information on which the Haskins & Sells report is based was fully available to the defendants, their lawyers and their accountants both before and during the trial and is thus not "newly discovered".

14. The claim of ineffective assistance of counsel merits little discussion. At the trial Ben Slutsky was represented by Louis Bender, Esq.; Julius Slutsky was represented by Moses Kove, Esq. The moving papers do not allege any inadequacy with respect to the representation which Mr. Kove provided Julius Slutsky. There was no material difference between the defense offered by Mr. Kove and that offered by Mr. Bender. Both Mr. Bender and Mr. Kove are unquestionably able and experienced criminal lawyers of proven competence and are among the most prominent members of the bar who practice before this Court. Mr. Bender's reputation as a leading specialist in criminal tax cases is well known. The accusation of inadequacy rests entirely on Mr. Bender's alleged failure to investigate and present the so-called "newly discovered evidence". It appears from the moving papers, however, that the decision not to conduct a comprehensive audit of the bank accounts was the product of trial counsel's considered judgment. That Mr. Bender may have defended this case believing that his client was guilty (even

enough to allegedly protected his innocence) is harmless. An attorney of Mr. Seifert's skill and experience is not naive, especially where, as here, the proof of guilt is overwhelming, as the jury ultimately found. As demonstrated in the memorandum of law submitted herewith, the allegations upon which the claim of inadequacy is based do not even remotely approach the kind of conduct which the Courts have held constitutes an infringement of the right to the effective assistance of counsel safeguarded by the Sixth Amendment.

Motion For Bail

15. On May 21, 1974 the mandate of the Court of Appeals was filed in the District Court. There is no authority for this Court to enlarge the defendants on bail any longer, and accordingly, they must surrender to commence serving their sentence immediately.

WHEREFORE, it is respectfully requested that defendants' motions be in all respects denied.

LAWRENCE S. [illegible]
Assistant United States Attorney

Sworn to before me this
[illegible] day of June, 1974.

SETH ANDREW SCHAEFER
Notary Public, State of New York
No. 34774[illegible]5
Qualified in New York County
Commission Expires March 30, 1975

Memorandum Decision by Lloyd F. MacMahon.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	72 CR. 1235-LFM
	:	MEMORANDUM
BEN J. SLUTSKY and JULIUS SLUTSKY, d/b/a "THE NEVELE,"	:	#40998
Defendants.	:	

MacMAHON, District Judge.

Defendants Ben J. Slutsky and Julius Slutsky, convicted after a jury trial of three counts of attempted personal income tax evasion, 26 U.S.C. § 7201, move, pursuant to Rule 33, Fed.R.Crim.P., for a new trial, or, in the alternative, for a hearing to determine the issues relating to that motion and for bail pending decision of the motion. The facts in this case are set forth in the opinion of the Court of Appeals affirming defendants' convictions, 487 F.2d 832 (2d Cir. 1973), cert. denied, 42 U.S.L.W 3584 (Apr. 15, 1974), rehearing denied, 42 U.S.L.W. 3632 (May 14, 1974), and a familiarity with that opinion is assumed.

Memorandum Decision by Lloyd F. MacMahon.

Defendants claim they are entitled to a new trial because (1) they are now in possession of newly discovered evidence which establishes their innocence, and (2) the failure of their trial counsel to investigate and discover this evidence constituted a denial of their right to effective legal representation.

Motions for a new trial based on the ground of newly discovered evidence must be distinguished from motions for a new trial predicated on other grounds. Because a defendant who seeks a new trial due to newly discovered evidence is permitted to make his motion within two years after judgment, instead of within seven days after a verdict or finding of guilty, as with other motions for a new trial, Rule 33, Fed.R.Crim.P., the federal courts have been admonished by the Supreme Court to prevent abuses of this type of motion. United States v. Johnson, 327 U.S. 106, 113 (1946). Thus such motions "are not held in great favor," United States v. Catalano, 491 F.2d 268, 274 (2d Cir. 1974), and the movant carries a heavier burden than in other motions for a new trial. United States v. Rachal, 473 F.2d 1338, 1343 (5th Cir. 1973); Brodie v. United States, 295 F.2d 157 (D.C.Cir.

1961).

A motion for a new trial on the ground of newly discovered evidence may be granted only if defendants can show that the evidence (1) was discovered after trial, (2) could not, with due diligence, have been discovered earlier, (3) is material to the issues and not merely cummulative or impeaching, and (4) is such that upon a retrial it would probably produce an acquittal. United States v. Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958); United States v. Rachal, supra; United States v. Puco, 338 F.Supp. 1252, 1254 (S.D.N.Y.), aff'd, 461 F.2d 846 (2d Cir. 1972); United States v. Fassoulis, 203 F.Supp. 114 (S.D.N.Y. 1962).

At trial of this action, the government contended that defendants had unreported income of $1,232,000 during taxable years 1965, 1966 and 1967. Defendants now claim that they have discovered that some $1,888,000 in payroll and other checks, all in amounts under $1,000, which were deposited in the Nevele's checking accounts at the First National Bank & Trust Company of Ellenville and the Ellenville National Bank, were not, as the government charged at trial, income items. Rather, they

claim, these items represent checks cashed for Nevele employees and guests by the hotel, using cash from non-income sources, specifically, three companies (Nevele Acres, Golden Gate-Olcott and Sunspa Resort Hotel), owned by the defendants during 1965-67. These companies allegedly issued checks payable to Ben and Julius Slutsky, who cashed them and used the currency obtained to meet the Nevele's payroll check cashing requirements.

As our statement of their position shows, defendants have totally failed to demonstrate, as they must to prevail on this motion, that the evidence they rely upon is newly discovered or that they exercised due diligence to discover it before or at trial. In fact, the defendants' moving papers, as well as the evidence at trial, indicate that the defendants were aware of the existence of this evidence at the time of trial.

Samuel Levis, accountant for the Nevele, testified that during the years in question large amounts of cash ($15,000-$18,000 a week) were kept on hand at the hotel to cash payroll and other checks. Yet, defendants made no attempt at trial to attribute those funds to non-income sources, despite the obvious importance of such evidence.

Memorandum Decision by Lloyd F. MacMahon.

Since the defendants themselves were the payees on checks issued by their own enterprises and cashed those checks on a regular basis, they surely knew of the Nevele's practice of cashing payroll checks at the time of trial. It surpasses belief to think that experienced businessmen, like the Slutskys, would not deem the check-cashing practice, involving as it did large sums of money, sufficiently important to bring it to the attention of their counsel.

Defendants explain their failure to enlighten counsel by claiming that he informed them that the government's case against them was weak and that they would succeed at trial. This hardly amounts to the affirmative showing of due diligence to discover the missing evidence which defendants must make to prevail on this motion. United States v. Birrell, 482 F.2d 890 (2d Cir. 1973); United States v. Pellegrino, 470 F.2d 1205, 1209 (2d Cir. 1972); United States v. Puco, supra; United States v. Rao, 318 F.Supp. 416 (S.D.N.Y. 1970); United States v. Bradwell, 295 F.Supp. 958 (D.Conn.), aff'd, 388 F.2d 619 (2d Cir.), cert. denied, 393 U.S. 867 (1968). The information involved here was, without a doubt, known to the defendants at trial, and their contention that they

were ignorant of its importance is simply not credible.

Finally, even were defendants to meet their burden of showing due diligence, the allegedly newly discovered evidence is not of such a type as to mandate an acquittal. The affirmation of counsel and defendants' affidavits make no attempt, beyond a bald assertion, to show that the checks issued to the Slutskys by Nevele Acres, Golden Gate-Olcott and Sunspa were drawn on non-income funds. Defendants admit that those enterprises had income of over $2 million during 1965-67, but completely fail to show that the funds used to cash checks at the Nevele were not part of that income. Their failure to produce evidence leading to an acquittal at retrial dooms the newly discovered evidence aspect of defendants' motion.

In short, defendants have utterly failed to make even a factual showing which would justify holding a hearing on their "new evidence" claim. Therefore, the motion for a new trial, to the extent it is based on newly discovered evidence, must be denied.

Defendants also seek a new trial on the ground of ineffective representation of counsel, citing trial

counsel's failure to order a complete audit of unidentified deposits in the Nevele's business checking accounts.

A claim of inadequate representation by counsel is measured by stringent standards in this circuit. See United States v. Maxey, Docket No. 73-1770 (2d Cir., May 28, 1974). Defendants must demonstrate that counsel's overall representation was "'of such a kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice.'" United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973), quoting from United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949); United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973). Cf. United States v. Maxey, supra. Defendants have simply not made such a showing. At most, counsel's decision not to conduct a complete audit of the unidentified deposits (which apparently could have been identified for him by his clients) was a matter of trial strategy, which our Court of Appeals has warned "is not to be ignored." United States v. West, 494 F.2d 1314 (2d Cir. 1974). As the government points out, counsel argued unsuccessfully, both at trial and on appeal, that the unidentified deposits were not income. Moreover, his decision

not to order a full audit was not unreasonable in light of his clients' inexplicable failure to inform him that the checks involved were (allegedly) cashed by the Nevele using non-income funds. Therefore, we reject, without a hearing, defendants' claim of inadequate representation by counsel.

Defendants also seek bail pending determination of this motion. Since we deny defendants' motion for a new trial without a hearing, the bail application is now moot and is therefore denied.

Accordingly, defendants' motion for a new trial, Rule 33, Fed.R.Crim.P., for a hearing to determine the issues raised in their motion, and for bail is in all respects denied.

So ordered.

Dated: New York, N.Y.
July 23, 1974

S/ Lloyd F MacMahon
LLOYD F. MacMAHON
United States District Judge

Endorsement by Judge MacMahon.

United States v. Slutsky

ENDORSEMENT
72 CR. 1235-LFM

The within motion for a new trial, for a hearing on the motion, and for bail pending a hearing and determination of the motion is in all respects denied for the reasons set forth in the opposing papers of the United States Attorney. A memorandum decision is to follow.

So ordered.

Dated: New York, N. Y.
July 17, 1974

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Motion for Reduction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

V.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "THE NEVELE"

Defendants.

MOTION FOR REDUCTION OF SENTENCE
UNDER RULE 35 OF THE FEDERAL RULES
OF CRIMINAL PROCEDURE
AND
MEMORANDUM OF LAW

E. STEWART JONES, ESQ.
28 Second Street
Troy, New York 12181

HERALD PRICE FAHRINGER, ESQ.
One Niagara Square
Buffalo, New York 14202

Attorneys for Petitioners

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES,
Of Counsel

Motion for Reduction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY,
a/b/a "THE NEVELE"

Defendants.

MOTION FOR REDUCTION OF SENTENCE PURSUANT TO RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affirmation of HERALD PRICE FAHRINGER and the other exhibits annexed hereto, the undersigned will move this Court on behalf of BEN J. SLUTSKY and JULIUS SLUTSKY at a time and place to be fixed by the Court in the United States Courthouse at Foley Square, New York, New York, for an order reducing their sentences pursuant to Rule 35 of the Federal Rules of Criminal Procedure, or in the alternative, vacating their sentences and granting bail to the petitioners pending the outcome of this application and affording such other and further relief as is just under all of the circumstances.

Dated: May 28, 1974
Buffalo, New York

YOURS, etc.,

E. STEWART JONES, ESQ.
28 Second Street
Troy, New York 12181

TO: PAUL J. CURRAN, ESQ.
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Attorneys for Petitioners

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "THE NEVELE"

Defendants.

ATTORNEY'S
AFFIRMED STATEMENT

STATE OF NEW YORK:
COUNTY OF ERIE : SS.
CITY OF BUFFALO :

HERALD PRICE FAHRINGER, affirms and states:

1. I am an attorney duly licensed to practice law in the State of New York with offices at One Niagara Square, Buffalo, New York. E. STEWART JONES is an attorney with law offices at 28 Second Street, Troy, New York 12181, and is acting as co-counsel in this application. We are both familiar with the facts and circumstances surrounding this case.

History of Case

2. In 1972 the defendants were indicted by a grand jury empanelled in the Southern District of New York for attempted income tax evasion and filing false tax returns in violation of §§7201, 7206 of Title 26 of the United States Code. Petitioners were represented by Louis Bender and Moses Kove, with offices at

225 Broadway, New York, New York. Following a jury trial on January 9, 1973, the defendants were found guilty in the United States District Court for the Soutern District of New York of the crimes charged in the indictment, and on March 19 of that same year, each of the defendants was sentenced to five years' imprisonment by the Honorable Lloyd F. MacMahon. A $40,000 fine was imposed on Ben Slutsky and a $35,000 fine was levied against Julius Slutsky. The cost of the prosecution was taxed against each of the defendants.

3. An appeal was mounted to the United States Court of Appeals for the Second Circuit, and on September 24, 1973 that court affirmed the defendants' convictions of tax evasion but reversed and vacated the false filing convictions. This modification of the judgment of conviction reduced the fines imposed to $30,000 for each of the defendants but left the prison sentences unaltered.

4. Within the time provided by statute a petition for rehearing was filed in the United States Court of Appeals for the Second Circuit and that application was denied on October 31, 1973. The United States Court of Appeals for the Second Circuit stayed the mandate in this case and the defendants have remained on bail throughout these proceedings.

5. In October of 1973, the defendants engaged E. Stewart Jones and Herald Price Fahringer to represent them in filing a petition for certiorari with the United States Supreme Court and

to attend to other matters connected with this case.

6. On January 2, 1974 a petition for certiorari was filed with the United States Supreme Court pursuant to §1254(1) of Title 28 of the United States Code. On April 15, 1974 the United States Supreme Court denied the defendants' petition for certiorari.

7. On April 22, 1974 the defendants filed a petition for rehearing with the United States Supreme Court requesting that the Court vacate its denial of the petition for a writ of certiorari and grant the petition and direct review of the judgment and opinion of the United States Court of Appeals for the Second Circuit. That petition was subsequently denied.

8. This motion to reduce petitioners' sentences is made pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The application has been made within 120 days from the denial of the petition for certiorari in the United States Supreme Court. We have conveniently divided the various branches of our application under informative subheadings. The material submitted on this application is for the most part information that has either developed since the original judgment was imposed or was not made available to the Court at the time of sentencing.

Attorney's Affirmed Statement.

The Illness of Ben J. Slutsky

9. Ben J. Slutsky is 65 years old and has been severely ill since the original imposition of judgment by this Court on March 19th, 1973. In May of 1973 Ben Slutsky was hospitalized with a severe case of hepatitis in the Horton Memorial Hospital in Middletown, New York. Subsequently he was released from that hospital but suffered a relapse and was readmitted to the same institution for five weeks in August and September of 1973. In November he was readmitted again and was not released until the middle of December. And finally, he had to return to the hospital in January of 1974 for 16 days. Listed below are the dates of admission and discharge at the Horton Memorial Hospital on Prospect Avenue in Middletown, New York:

Admitted	Discharged	Days Confined
May 20, 1973	June 16, 1973	28
August 31, 1973	September 13, 1973	14
November 29, 1973	December 12, 1973	15
January 13, 1974	January 29, 1974	16
	Total -	73

10. Attached to this petition are the hospital records which detail the treatment of Ben Slutsky and the critical nature of his illness. Listed below are the various hospital records with an exhibit designation for the periods of confinement :

Attorney's Affirmed Statement.

RECORDS OF E. A. HORTON MEMORIAL HOSPITAL

May 20, 1973 - June 16, 1973	—	Exhibit "A"
August 31, 1973 - September 13, 1973	—	Exhibit "B"
November 29, 1973 - December 12,1973	—	Exhibit "C"
January 13, 1974 - January 29, 1974	—	Exhibit "D"

11. Dr. Louis A. Lazar,whose offices are at 27-31 Ridge Street, Middletown, New York, asserts in an affidavit attached to this petition and designated as Exhibit "E", that "recent liver function tests done on 9 April, 1974 show an increasing abnormality of his (Ben J. Slutsky) liver function once again. Another liver biopsy (done at the time of his last Horton Hospital admission) showed continuing active hepatitis."

12. Dr. Lazar further states:

> "The prognosis of his problems with respect to both his now chronic active hepatitis and diabetes mellitus is very guarded. This form of prolonged active hepatitis is unusual and requires constant ongoing medical care, relief from all physical and mental stress humanly achievable, and special attention to diet.

* * *

Attorney's Affirmed Statement.

> It is my firm clinical judgment that Mr. Slutsky's health status is indeed precarious. Any change in the ongoing care and attention will tend to seriously jeopardise his health. He must have a combination of prolonged rest, specific and variable diet therapy which will of necessity change with the circumstances of his hepatitis and diabetes; continuing specialized medical care and judgment. The potential for liver failure, cirrhosis, complicating secondary infection, additional complications relating to variations in the intensity of his diabetes (already documented to be a significant and highly variable problem) are all real and threatening."

Dr. Lazar goes on to state that it is his "firm medical opinion" that the serving of any prison sentence would imperil Mr. Slutsky's health and would undoubtedly initiate a serious recurrence of hepatitis which would be critically debilitating. In Dr. Lazar's judgment, the service of his sentence would constitute "a threat to his life."

Dr. Lazar feels it is imperative that an appointment be made with Dr. DeBakey of Houston, Texas, the famous heart specialist, because of Ben Slutsky's serious heart ailment. Within the last month, he has lost his vision on two separate occasions and Dr. Lazar believes this is related directly to a form of coronary insufficiency.

Attorney's Affirmed Statement.

13. Surely under these circumstances the very least the defendant is entitled to is a hearing on this application so that he might present proof of his critical illness so that the Court can fully satisfy itself of Ben Slutsky's disability.

14. Ben Slutsky's desperate medical situation has arisen since this Court imposed its original sentence and therefore requires that this Court reconsider that judgment in light of these compelling circumstances.

Attorney's Affirmed Statement.

Lack of Tax Deficiency

15. In a motion for a new trial counsel set forth in detail documented proof demonstrating beyond doubt that the government's claim of a tax deficiency in the amount of approximately $1,200,000 over a period of three years was fully accounted for by an undiscovered procedure of cashing Nevele payroll checks and depositing them in the Nevele checking account. Although the Court rejected this application, presumably on the grounds that the evidence was not newly discovered, surely these unrefuted facts must have some bearing now on the Court's reconsideration of the sentence imposed. None of these compelling features were known to the Court at the time sentence was imposed.

16. Throughout the trial the Court invited defense counsel to share with it their theory of defense. For reasons unknown to us this check cashing procedure, which has never been controverted by the government, was never introduced at petitioners' trial. The Court repeatedly inquired "What schedule sets forth your contentions?" and "Where is your calendar schedule?" and later "What schedule sets forth your contentions so I can put it to the jury?" These excerpts taken from the trial record, which are illustrative only and are by

no means exhaustive, fully demonstrate the Court's concern for the petitioners' defense.

17. We are now able to conclusively show that as a result of payroll checks being cashed by the use of currency necessarily acquired from outside sources, over $1,500,000 was charged to The Nevele as income which was clearly non-income. Each and every one of these payroll checks were deposited in The Nevele checking account and charged as income against petitioners. Since the government was proceeding on a bank deposit method of computing income and because of the large number of checks deposited in The Nevele checking account, it only investigated checks deposited of over $1,000. Because the payroll checks were all under that amount they were included in the government's audit as income under this bank deposit theory of prosecution. In our motion for a new trial, we fully verified that the large amounts of currency needed to cash these payroll checks had to be secured from outside sources. As shown by the chart below, the cashing of The Nevele payroll checks and the depositing of them in The Nevele checking account exceeds the tax deficiency charge for each of the years alleged in the indictment. And of course the total Nevele checks cashed exceeds the unreported income in even a greater amounts.

Attorney's Affirmed Statement.

	1965	1966	1967
Total Nevele checks cashed and deposited	$533,617	$633,250	$720,602
Payroll checks cashed and deposited	$448,920	$509,666	$591,749
Alleged unreported income	$399,177.21	$477,910.47	$354,975.32

18. In our motion for a new trial we showed through documented and undisputed evidence that these payroll checks, cashed through the use of currency from non-income sources, were responsible for petitioners' being charged in each of the years in question with unreported income which in reality was not income. Since they have not evaded paying taxes on their income they should not be punished. These uncontroverted findings are fully verified by the Haskins & Sells reports attached to this petition and designated Exhibits "F" and "G". That leading accounting firm invested more than 500 hours conducting a thorough investigation of the Nevele account and are able to fully verify this payroll cashing procedure, which accounts for more than

$1,500,000 erroneously charged against the petitioners as income. Haskins & Sells also located $470,975 in non-income items which were mislabeled by the government as income.

19. Certainly all this information, fully developed for the first time and completely verified by Haskins & Sells deserves some consideration in reevaluating the penalties imposed upon the petitioners in this case.

Attorney's Affirmed Statement.

PETITIONERS' PHILANTHROPY

For some unknown reason, the petitioners' remarkable philanthropy over the years was not brought to the Court's attention prior to sentencing. We have divided the charitable activities of Ben and Julius Slutsky under appropriate subheadings. Some contributions are made by them individually or through companies controlled by them.

YOUTH

Joseph Slutsky Center

Ben and Julius Slutsky have built and maintained the Joseph Slutsky Center, named after their father, which provides the youth in the community of Ellenville with a constructive program of a wide variety of activities. The Center conducts music classes, photography courses, dance programs, art programs, and all sorts of social activities to keep young people occupied in a healthful and beneficial fashion. Several hundred children are continually using this building on a daily basis. It is staffed with a director and other part-time people working under his supervision. The operation of the building is funded by the Community Chest, but the Slutskys maintain the premises. For instance, they have from time to time refurbished the building and constantly maintain it. They contribute annually to the operation in the amount of approximately $2,500.00.

Attorney's Affirmed Statement.

Monticello Youth Group

The Monticello Youth Group which consists of about 500 boys and girls of all races and creeds is completely financed by Ben and Julius Slutsky. It sponsors a 40 member drum and bugle corps and a 35 member color guard.

Association for the Help of Retarded Children

For the last 7 years Ben and Julius Slutsky, through The Nevele Hotel, have given the annual ball devoted to raising funds for the AHRC. They have contributed the food, the help, the beverages, and everything else that is utilized in financing the banquet. Substantial moneys have been raised for the help of retarded children through their efforts. They have also made contributions individually to this association in addition to subsidizing the banquets.

Attorney's Affirmed Statement.

Villanova Seminary

Ben and Julius Slutsky financed the building of 7 seminary rooms for the training of priests at the new seminary constructed at Villanova University near Philadelphia, Pennsylvania, about 10 years ago. This contribution was made through Father Murray who attended Villanova University with Ben Slutsky.

For the past 30 years, Ben and Julius Slutsky have made jobs available to young men attending Villanova and New York University in an effort to help them pay their way through college. Ben and Julius have been regular donors to the University of Villanova for the past 35 years.

In 1972 the University of Villanova offered to give Ben Slutsky an honorary doctorate degree but he declined this award because of the embarrassment of his pending indictment.

Attorney's Affirmed Statement.

A number of years ago Ben and Julius Slutsky were the major contributors of a church through Father Killian inside the walls of the Napanock Reformatory in New York State. They were then instrumental in a drive to provide furnishings for that church.

Ben and Julius Slutsky have contributed regularly to the St. Albert's Seminary for underprivileged children. Their attorney, Leon Greenberg, serves on the Board of Trustess.

Attorney's Affirmed Statement.

MEDICAL CENTERS

Ben and Julius Slutsky contributed $110,000 to the building of the Ellenville Community Hospital. They have pledged $100,000 to the construction of the Monticello Community Hospital of which $60,000 has already been paid. This year they will donate another $20,000 of that pledge.

Ben and Julius Slutsky are in the process now of making a pledge to St. Benedictine Hospital in Kingston, New York, through Sister Mary Charles in the amount of $100,000. They have made regular contributions to the Horton Memorial Hospital in Middletown, New York, and donated an x-ray machine to the Veterans Memorial Hospital in Ellenville, New York.

Attorney's Affirmed Statement.

OTHER CHARITIES

Since the inception of the Inter Faith Ministers Association for the tri-county area around Albany, The Nevele Hotel has contributed its facilities for all their conferences on the average of six times a year.

Last year Ben Slutsky heard over the radio that the community was not able to open its local swimming pool, used mostly by young people, because of a lack of funds. The broadcast indicated that they needed $1,000. Ben Slutsky immediately called the community organization in charge of this recreational facility and donated $1,000 and the pool was opened.

On the following page there is a list of contributions made by Ben and Julius Slutsky to various charities for the year 1973.

Attorney's Affirmed Statement.

Name of Charity	Amount of Donation
Monticello Rotary	$ 100.00
March of Dimes	300.00
Hebrew Day School	2,500.00
Liberty Central High School PTA	20.00
Hertz Scholarship Fund	100.00
Anti-Defamation League	1,000.00
Red Cross	250.00
Children's Rehabilitation Center	500.00
New York State Veterinary College Cornell University	13,928.87
Catholic Charities	500.00
Hebrew Day School	100.00
Heart Fund	100.00
VFW Loyalty Day Queen	25.00
Little League, Fallsburg	100.00
Sullivan County Dairy Princess	25.00
Monticello Little League	150.00
Sullivan County Community College Scholarship Fund	250.00
Mongaup Game Preserve	80.00
City of Hope	150.00
Temple Rodeph Sholom	100.00
Student Loan Fund -	100.00
Catskill Art Society	100.00
National Jewish Hospital - Denver	102.75
First Baptist Church	25.00
Liberty Loomis Hospital	100.00
All-American Collegiate Golf Foundation	400.00
Knights Templar Eye Foundation	100.00
Fallsburg Woodbourne Hadassah Chapter	100.00
Hadassah	150.00
Yeshiun-Torah Vodaath	200.00
Mongaup Game Preserve	48.00
Periwinkle Productions	500.00
Rabbinical Seminary	150.00
Sullivan County Volunteer Underwater Recovery Unit	200.00
Monticello Exempt Firemen's Association	25.00
Sarah Wells Firl Scout Council	50.00
Muscular Dystrophy	500.00
Sullivan County Chapter, American Red Cross	250.00

Attorney's Affirmed Statement.

Name of Charity	Amount of Donation
Deborah Hospital	$ 150.00
Hall of Fame of Trotter	944.52
Syracuse University	100.00
Association for Help of Retarded Children	500.00
National Jewish Hospital	46.75
Irving Hertz Memorial Scholarship	250.00
Ladies Auxiliary of Mountaindale	100.00
Stalberts Junior Seminar	600.00
Hebrew Day School of Sylvester	250.00
Community General Hospital	20,000.00
Sullivan County Community College Scholarship Fund	250.00
National Jewish Hospital	102.75
Total	$ 46,673.64

Attorney's Affirmed Statement.

COMPARATIVE SENTENCES

Today, great emphasis is placed upon uniform sentences. As pointed out in our accompanying brief, the basis for this concept lies in fundamental principles of equal protection under our law. It is manifestly unjust that one man be condemned to prison for five years for attempted income tax evasion while other men, convicted of more serious offenses, are placed on probation or given lighter terms. Since a reevaluation of petitioners' sentences is warranted, we have prepared a chart of comparative sentences which we believe are most instructive.

Attorney's Affirmed Statement.

Case Title	Charge	Sentence
U.S. v. Spiro Agnew U.S.D.C. District of Maryland No. 73-0535	Income Tax Evasion	3 years unsupervised probation and $10,000 fine Hon. Walter E. Hoffman Oct. 10, 1973
U.S. v. Smith & Lauria U.S.D.C. E.D.N.Y.	Loan Sharking §894 of Title 18 Threats and Acts of Brutality Against Victims	Both defendants sentenced to 3 years Hon. Anthony J. Travia
U.S. v. Daniel J. Motto, et al. U.S.D.C. S.D.N.Y. 67 Cr. 1051	§371 (Conspiracy) and §1952 (Interstate Facility to Commit Crime) Charges arouse out of the infamous Jerome Park Reservoir scandal with claim that city was bilked out of substantial sums as result of kickback. (Motto was a labor leader.)	2 years July 26, 1968 Hon. Edward Weinfeld
U.S. v. Henry Fried, et al. U.S.D.C. S.D.N.Y.	" (Freed was owner of S. T. Grand, Inc.)	2 years under §4208(a)(2) Hon. Edward Weinfeld
U.S. v. James Marcus, et al. U.S.D.C. S.D.N.Y.	" (Marcus was Commissioner of Water)	1 year §4208(a)(2) Hon. Edward Weinfeld
U.S. v. Antonio Corallo, et al. U.S.D.C. S.D.N.Y. 67 Cr. 1051	" (Tony "Ducks" Corallo was a reputed Mafia leader.)	3 years Hon. Edward Weinfeld

Attorney's Affirmed Statement.

Case Title	Charge	Sentence
U.S. v. Joseph Ruggiero U.S.D.C. S.D.N.Y. 71 Cr. 1226	5 counts of perjury; convicted on 3 counts.	1 year and a day, to be placed on parole after service of 3 months of sentence Hon. Sylvester J. Ryan Aug. 17, 1972
U.S. v. Sidney Turoff U.S.D.C. W.D.N.Y. 7539-C	Contempt of Congress, vio. §192, Title 2, U.S.C. Failure to testify before House Un-American Activities Committee	60 days Hon. Harold P. Burke Dec. 17, 1959
U.S. v. Fago U.S.D.C. W.D.N.Y. 7879-C	9 counts of income tax evasion; convicted of 8 counts.	18 months imprisonment and $10,000 fine Hon. John O. Henderson May 21, 1962
U.S. v. Ferris Alexander, et al. U.S.D.C. S.D.N.Y. 69 Cr. 747	13-count indictment charging transportation in interstate commerce of pornography.	18 months imprisonment and $15,000 fine Hon. Lloyd F. MacMahon Dec. 1, 1970
U. S. v. Burtman U.S.D.C. S.D.N.Y. 69 Cr. 435	Conspiracy to import obscene material; §371, Title 18	1 year and $5,000 fine Hon. John M. Cannella Oct. 29, 1969 Reduced on motion under Rule 35 to 8 months.

Attorney's Affirmed Statement.

Case Title	Charge	Sentence
U.S. v. Aaron Goldstein, et al. U.S.D.C. N.D. Ohio	Vio. Federal Gambling Statute, §1955, Title 18	Fine and suspended sentence Hon. Frank J. Battisti
U.S. v. Joseph Vizzi, et al. U.S.D.C. W.D.N.Y.	"	Fine and suspended sentence Hon. John T. Curtin
U.S. v. Michael Leo Fiorella, et al. U.S.D.C W.D.N.Y. 71 Cr. 45	"	2-year suspended sentence and 2-year probation and fines Hon. Harold P. Burke Apr. 4, 1972
U.S. v. Richard Becker, et al. U.S.D.C. S.D.N.Y. 71 Cr. 733	"	2-year sentence, 6 months to be served Hon. Edward Weinfeld Jan. 14, 1972
U.S. v. Michael Roman U.S.D.C. S.D.N.Y. 73 Cr. 56	"	1 year, to run concurrent with term already serving on other offense Hon. Morris E. Lasker Feb. 15, 197[illegible]

Attorney's Affirmed Statement.

Case Title	Charge	Sentence
U.S. v. Edward Evans, et al. U.S.D.C. W.D.N.Y.	Conspiracy to Obtain Fraudulent Loans and Misapplication of Bank Funds	All defendants received 1-year suspended sentence and probation except one lawyer who received 30 days imprisonment. Hon. Harold P. Burke
U.S. v. Bernard Renzi U.S.D.C. Rhode Island	8 counts of income tax evasion.	4 months imprisonment Hon. Raymond J. Pettine Oct. 10, 1973
U.S. v. Jesse Burney U.S.D.C. N.D.Ca. No. 28098	3 counts of income tax evasion.	5 years probation* Hon. Richard C. Freeman Oct. 9, 1973
U.S. v. Irving Whalley U.S.D.C. Dist. of Columbia Cr. 596-73	Republican congressman from western Pennsylvania charged with mail fraud and obstructing justice.	3 years probation and $11,000 fine. Hon. John L. Smith, Jr. Oct. 15, 1973
U.S. v. Santo Signorino U.S.D.C. Mass. No. 72-406-G	14 counts of accepting bribes as a meat inspector.	18 months imprisonment, 6 months to be served, 2 years probation and a suspended $1,000 fine. Oct. 9, 1973

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* Wall Street Journal, October 26, 1973. In an article entitled Agnew Cases Point Up Inconsistent Sentencing for Criminal Offenses it was reported that out of twenty-five tax evasion convictions in an Atlanta federal court over the past five years, only six defendants were sentenced to prison. In Denver, all persons convicted of tax cases for the year 1973 received a minimum of thirty days in prison. However, none of those cases involved failing to file tax returns.

Attorney's Affirmed Statement.

State Cases

Case Title	Charge	Sentence
People v. Donald Neff Erie County Court No. 34,396-A&B	Convicted of perjury (Erie County Director of Purchasing)	Probation Hon. Ernest L. Colucci May 6, 1969
People v. Graziano Erie County Court No. 34,396-A	36 counts including grand larceny 2d, grand larceny 3d, petit larceny, criminal possession of stolen property and official misconduct. Convicted: two counts of official misconduct (Purchasing Agent of Meyer Memorial Hospital)	3 years probation and $1,000 fine Hon. Joseph S. Mattina
People v. Thomas Caulfield Erie County Court No. 37,819-I	7-count indictment, including receiving reward for official misconduct, theft of services and petit larceny. (Director of Parks of the City of Buffalo)	3 years probation and $1,500 fine Hon. Frederick M. Marshall
People v. Morris Massry Rensselaer County Court Nos. C3837, 3838	Convicted of perjury (Real Estate Developer)	Conditional discharge and fine Hon. Matthew M. Dunne Sept. 28, 1973
People v. Richard Ornstein New York County Court No. 7257	Convicted of perjury in the first degree (New York City Police Officer)	3 years probation App. Div. First Dept. October, 1973

Attorney's Affirmed Statement.

Case Title	Charge	Sentence
People v. Frank Benny (real name Beniak) Erie County Court No. 36-760	Robbery in Third Degree (Plead to lack of responsibility by reason of mental defect, §330.20 CCP.)	Probation Hon. Joseph S. Mattina
People v. Fred Turetsky New York County	Convicted of Bribery, Class D Felony (New York City Police Officer)	5-years probation Hon. Harold Baer 1971

Attorney's Affirmed Statement.

INEFFECTIVENESS OF §4208(a)(2) PROVISION

A recent study conducted by the United States Board of Parole filed with the Committee on the Judiciary, House of Representatives, 92nd Congress, studying corrections in federal and state parole systems, demonstrates conclusively that a sentence under the provisions of §4208(a)(2) is of little consequence to a prisoner. In fact, he normally serves his minimum term. In the Report of the parole board, under "Length of Sentences," it was stated:

> "As will be seen, however, the number of months served in confinement by those who receive parole does not differ remarkably regardless of sentence procedure."*

In Table XIV of the Report there is set forth a comparison of the time served before parole under a regular sentence and an indeterminate sentence under §4208(a)(2) of Title 18, U.S.C. This chart, which we have reproduced below, shows conclusively that a person receiving a 4208(a)(2) sentence serves the same amount of time as the person who is sentenced to serve a regular term.

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* United States Board of Parole, Biennial Report at 13 (1970), hereinafter referred to as "Report."

	1966	1967	1968	1969	1970
"Regular" adult sentence	17.4	20.8	18.1	19.1	20.7
Sentence under §4208(a)(2)	18.7	20.9	18.8	19.0	20.4

(Figures represent months served)

This chart shows conclusively, and we might add, persuasively, that the imposition of an "(a)(2) sentence" does not mean a thing. In other words, a person serves the exact amount of time under an "(a)(2) sentence" as another person does receiving a "regular" sentence.

Furthermore, under Table XIII of the Report, a man sentenced to prison for income tax evasion will not be paroled until he serves 30.1 percent of his sentence. Under the classification of "White-colar crimes" which the Report shows includes income tax violations, a study of all the cases for the year 1970 reveals that those defendants served almost half of their sentence imposed.* Relating those figures to our case, Ben and Julius Slutsky will serve 24 months.

Relating these facts to the case at hand leads to the startling conclusion that Tony "Ducks" Corallo, reputed Mafia leader; Daniel

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* United States Board of Parole, Biennial Report at 24 (1970). The biennial report covering July 1, 1970 to June 30, 1972 shows that in 1972 a man serving a "regular" sentence averaged 24.9 months while a person serving an "(a)(2) sentence" served 25.5 months.

Attorney's Affirmed Statement.

Motto, labor racketeer; Henry Fried, corruptor of public officials; Ferris Alexander, dealer in pornography; Leonard Burtman, importer of pornography; Jesse Smith, extortionist, serving their minimum time, without parole, have served less time than Ben and Julius Slutsky will serve. Everyone must concede that that fact is staggering! Obviously, none of the defendants mentioned above were of the age, background, and had not committed the acts of charity that Ben and Julius Slutsky have performed. Many of the crimes involved above involve far more serious violations of public policy and, in some instances, violence. Here, we have been able to show that there is no tax due and owing and even if there were, that will be recouped by the government in the civil tax case. It is shocking that these two elderly men will probably serve a longer term than each of the men listed above. Surely, these compelling statistics require a re-evaluation of the sentence imposed upon Ben and Julius Slutsky.

What is even more shocking is that Table XIII of the Parole Board's Report shows that in 1970 the average person convicted of counterfeiting served only 17 months in jail; a defendant convicted of auto theft served only 17 months in prison; a man convicted of forgery served only 17 months in jail; a person convicted of postal theft served only 14 months in jail. (See Board of Parole Report, p. 24)

Attorney's Affirmed Statement.

These statistics are actual months served in prison. Again, we must repeat, it is hard to believe that this Court intended that Ben and Julius Slutsky should serve more time in prison than counterfeitors, forgerers, thieves, and the individual defendants listed above.

Surely the accumulation of all these facts, i.e., the serious illness of Ben Slutsky; the lack of any tax deficiency; the charitable accomplishments of both the Slutskys; the comparative sentences in other cases involving far more gross violations of the law where men were sentenced to lesser terms; the ineffectiveness of an "(a)(2) sentence" should compel this Court to take another hard look at the sentence imposed upon Ben and Julius Slutsky. At the very least, we feel under all the circumstances a hearing should be conducted to fully investigate all of the factors we have submitted to this Court. We would welcome such an investigation and will be able to document, verify and certify each and every fact submitted to this Court.

Attorney's Affirmed Statement.

NEW ACCOUNTING SYSTEM

Since the Internal Revenue Service investigation of the financial affairs of Ben and Julius Slutsky, they have hired a reputable accounting firm which has fully and completely reorganized their bookkeeping system to avoid the problem created by the inadequate system established by a single practitioner a number of years ago. This is not to suggest for a moment there is in fact a tax deficiency because we believe the proof included in our motion for a new trial demonstrates conclusively that the inferences drawn by the government, through their bank deposit method of computing income, are incorrect by reason of the $1,500,000 in payroll checks deposited in the Nevele checking account. Nevertheless, we feel obliged to advise the Court that steps have been taken to make sure that each and every transaction relating to the Nevele business is recorded under the highest accounting standards.

Attorney's Affirmed Statement.

CONCLUSION

Wherefore, for all these reasons, it is most respectfully urged that the Court reduce petitioners' sentences and place them on probation or, in the alternative, grant a hearing so that a full judicial investigation can be conducted of all the issues raised by this motion and that this Court grant bail pending the determination of this application and accord the petitioners such other relief as is just under all the circumstances of this case.

Respectfully submitted,

HERALD PRICE FAHRINGER,
One Niagara Square
Buffalo, New York 14202

E. STEWART JONES, SR.
28 Second Street
Troy, New York 12181

Attorney's Affirmed Statement.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

BEN J. SLUTSKY and JULIUS SLUTSKY,
d/b/a "THE NEVELE"

Defendants.

BEN J. SLUTSKY'S AND JULIUS SLUTSKY'S MEMORANDUM OF LAW IN SUPPORT OF THEIR PETITION FOR RESENTENCING.

Respectfully submitted,

E. STEWART JONES, ESQ.
28 Second Street
Troy, New York 12181

HERALD PRICE FAHRINGER, ESQ.
One Niagara Square
Buffalo, New York 14202

Attorneys for Petitioners

Attorney's Affirmed Statement.

PRELIMINARY STATEMENT

This motion is brought under the authority of Rule 35 of the Federal Rules of Criminal Procedure for a reduction of the petitioners' sentences.

This application has been made within 120 days allowed under Rule 35 for such a petition.

We have assembled in our petition a large quantity of facts which have either developed subsequent to the imposition of the original sentence or were not available to the Court at the time sentenced was imposed.

Ben Slutsky's severe illness certainly warrants reconsideration of his sentence and the other factors developed in our application, such as a lack of tax deficiency, the charitable achievements of both brothers, and other policy considerations on sentencing should require this Court to reevaluate the sentence imposed and reduce it.

Attorney's Affirmed Statement.

POINT I

UNDER THE COMPELLING CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD REDUCE PETITIONERS' SENTENCES.

The Court of Appeals for the Second Circuit has discussed the purposes of a motion to reduce sentence under Rule 35 in United States v. Ellenbogen, 390 F.2d 537 (1968). In Ellenbogen, the Court wrote:

> ... the motion to reduce sentence, under Rule 35, is founded upon the assumption that a certain amount of time has passed between the imposition of the sentence and the time when the court's power to reduce or correct it is sought to be invoked by the convicted defendant. The motion to reduce a sentence is 'essentially a plea for leniency,' Poole v. United States, 102 U.S. App. D.C. 71, 250 F.2d 396, 401 (1957); 8 Moore's Federal Practice ¶35.02[1] at 35-2.2-35.3 (1967). Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim. (390 F.2d 537, 543)

The power to reduce a previously imposed sentence, albeit within the statutory time limitation, is within the discretion of the District Court. Yates v. United States,

356 U.S. 363 (1958); United States v. Ellenbogen, 390 F.2d 537 (1968); United States v. Orlando, 206 F.Supp. 419 (E.D.N.Y. 1962).

Though a motion for the reduction of sentence is properly within the trial court's discretion, that discretion must be exercised so as not to be artibrary or whimsical.

In judging the defendant's motion for reduction of sentence, guidance may be gleaned from the Third Circuit decision in United States v. Ginzburg, 398 F.2d 52 (3rd Cir. 1968). In that case, the unsuccessful petitioner in the celebrated Supreme Court decision moved for a "vacation, suspension or reduction of sentence" and a hearing for the presentation of evidence to support his petition. The Government opposed only the portion of the motion addressing itself to the vacation or suspension of sentence. Indeed, the Government expressly agreed that a hearing should be held on the merits of the petition. (398 F.2d at 53)

The District Court denied Ginzburg's request for a hearing and on appeal the Third Circuit, sitting en banc, reversed and remanded for a hearing. In directing the District Court to proceed in accordance with its opinion, the Court of Appeals

discussed the factors it deemed relevant to a reduction in the sentence. The Court wrote:

> Ginzburg's application to present testimony as to his character and prior good conduct record as a law-abiding citizen; the family hardship impacts of his sentence; his commitment to cease the publication of material of the kind which led to his conviction; and his commitment to lead a life free of any criminal conduct, presents considerations significant to the sentencing process, especially when viewed against the background of his 5-year prison sentence. (398 F.2d 52, 55)

The Court of Appeals remanded for a hearing and, in addition, stated:

> "Further, we feel compelled to express our view, that should Ginzburg's testimony at a hearing on his petition establish that he did not participate in the aura producing techniques condemned by the Supreme Court, viz., the mail privilege solicitations . . . and the good character and hardship aspects of his petition, that it would warrant a significant change by the District Court in the nature and character of its present sentence. (398 F.2d 52, 56)

In United States v. Orlando, 205 F.Supp. 419 (E.D.N.Y. 1962) the defendant moved for a reduction of sentence on the basis of affidavits which informed the court that the defendant's wife

had become seriously ill. As a result of her illness, she was no longer self-supporting and had to reside with her aged aunt. The court, in light of the family hardship, reduced the defendant's sentence from 17 to 10 years, to run concurrently with another sentence previously imposed in another district. The result was that the defendant became eligible for parole within two months.

Some criticism has been registered regarding the Orlando case, but it revolves primarily around the fact that the court acted in excess of the narrow time limitations of Rule 35. No quarrel may be had with the discretion to reduce the sentence. In Orlando, it should be noted, the defendant had a criminal record as well as two convictions underlying the sentence that was reduced. The petitioners at bar present a record of considerably more merit.

In United States v. Felicinao-Grafals, 309 F. Supp. 1292 (D. Puerto Rico 1970), the chief judge of that district reduced the defendant's sentence of one year imprisonment for refusal of induction into the Armed Forces to one hour's confinement. In that case, the court sought to avoid a sentence that would have a destructive effect on an otherwise useful member of society. The court wrote:

Attorney's Affirmed Statement.

> "The legislator [sic] did not want to put the judge in a straight jacket. He left the minimum sentence to the judge's discretion. This must have been for the purpose of allowing him, who knows the facts and particular situations in specific cases which could not be foreseen by the Congress, to mitigate the effects of the law in truly meritorious cases, by imposing a nominal sentence; . . . (309 F. Supp. 1292, 1299)

A motion timely made for a reduction of sentence permits, as Judge Seitz notes in his concurrence in the Ginzburg case, the "updating of a sentenced defendant's personal history in aid of an informed reconsideration " (398 F.2d 52, 57) This view is also clearly stated in the Ellenbogen case, supra. There is no question that the court has the power, in its own discretion, to reduce the present sentence. Furthermore, the appellate process has been completed and there exist none of the complications dealt with in the Ellenbogen and Feliciano-Grafals cases, supra. In those cases, the motion for reduction of sentence was brought after the appellate process had begun and while it was still in progress.

A close examination of each of the authorities cited above where sentences were reduced involve far less compelling circumstances than those presented here. Certainly the court

is authorized in this case and should exercise its discretion in modifying petitioners' sentences. We will now devote ourselves to the reasons, more fully set forth in our petition, which justify a reduction of petitioners' sentences.

The Illness of Ben Slutsky

Ben Slutsky has been in the hospital four times for a total period of 73 days within the last year. He is seriously ill with a re-occurring hepatitis which requires a strict diet and constant care. He is also suffering from coronary insufficiency and has made arrangements to see one of the country's leading heart specialists in Texas, who will investigate this malady. As Dr. Lazar points out so authoritatively, a prison sentence may well be the equivalent of a death sentence. For a man of his age and suffering from the illnesses he bears, to be slapped into prison would be inhumane. Admittedly, many of these facts were not known to the Court at the time sentence was imposed. Otherwise, we are certain the sentence would have been different.

Attorney's Affirmed Statement.

Lack of Tax Deficiency

We have certified to this Court, in a motion for a new trial, rejected on other grounds, that the tax deficiency relied upon by the Government in their indictment, is erroneous. We have shown through documented evidence and compelling proof, assembled by one of the leading accounting firms in the country, Haskins & Sells, that the tax deficiency charged by the Government is fully overcome by the practice of depositing in a Nevele checking account, payroll checks cashed for the employees. We have also verified that the currency needed to achieve this payroll check-cashing program necessarily had to come from outside, non-income sources.

Incidentally, the Haskins & Sells report showed over $470,000 in non-income items which had been mislabeled by the Government as income. Certainly, if these facts had been known to the Court at the time sentence was imposed, it is impossible to imagine the Court would have imposed the sentence it levied. It is tragic that this evidence was not presented to the jury, for it any group of human beings, judging the petitioners' tax case, could have had the benefit of this proof, there certainly could not have been a conviction.

Attorney's Affirmed Statement.

Comparative Sentences

Today, there has been a great emphasis upon uniform sentences. The basis for this concept lies in basic principles of equal protection. It is manifestly unjust that one man be condemned to prison for five years for tax evasion and dozens of others are placed on probation.

As an example, the Honorable Walter E. Hoffman, in sentencing Spiro Agnew on charges of income tax evasion, stated on October 10, 1973:

> "We come then to the charge of income tax evasion which, as I stated, is a felony and a most serious charge in itself. In approving the plea agreement . . . I have not overlooked my prior writings and sentences in other income tax cases. Generally speaking, where the defendant is a lawyer, a tax accountant or a business executive, I resort to the practice of imposing a fine, and a term of imprisonment, but provide that the actual period of confinement be limited to a period of from two to five months, with the defendant being placed on probation for the balance of the term."*

---

* New York Times, October 10, 1973

Attorney's Affirmed Statement.

The Honorable Marvin E. Frankel, United States District Judge for the Southern District of New York, in his recent book, Criminal Sentences - Law Without Order,* has stressed the need for a greater uniformity in imposing penalties on those convicted of crime.

The President's Commission on Crime concluded:

> "The correctional strategy that presently seems to hold the greatest promise, based on social science theory and limited research, is that of re-integrating the offender into the community. A key element in this strategy is to deal with problems in their social context, which means in the interaction of the offender and the community. It also means avoiding as much as possible the isolating and labeling effects of commitment to an institution. There is little doubt that the goals of re-integration are furthered much more readily by working with an offender in the community than by incarcerating him." (The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 28, 1967)

The American Bar Association's Committee on Standards for Criminal Justice has found:

---

* Farrar, Straus & Giroux, New York, 1973.

Attorney's Affirmed Statement.

> " . . . probation is properly viewed as a sentence just like any other sentence. It is an attempt by society to impose a sanction which will accomplish its goals, just as any other sentence is designed to do. The fact that it differs from other sentences in that the defendant remains subject to a prison term if he does not comply with the conditions of his release does not suggest or require the need for confusing terminology." (President's Comm'n Corrections at p. 25)

The Committee carefully enumerated many of the reasons why probation is desirable by stating:

> "Desirability of Probation.
>
> Probation is a desirable disposition in appropriate cases because:
>
> (i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of the law;
>
> (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
>
> (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;
>
> (iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;
>
> (v) it minimizes the impact of the conviction upon innocent dependents of the offender."
>
> (Standards Relating to Probation, p. 27)

Attorney's Affirmed Statement.

Formal studies which have recommended probation in cases like our own are listed as follows: New York State Div. of Probation, Dep't of Correction, An Evaluation of Probation Success: A Study in Post-Discharge Recidivism (1964); The Results of Probation (L. Redzinowitz ed. 1958); J. Rumney & Murphy, Probation and Social Adjustment (1952); M. Grunhut, Penal Reform 309-12 (1948); 2 Attorney General's Survey of Release Procedures: Probation (1939); Commission on Probation, Report on the Permanent Results of Probation, Mass. Senate Doc. No. 431 (1924); Scarpitti & Stephenson, A Study of Probation Effectiveness, 59 Crim. L.C. & P.S. 361 (1968); Davis, A Study of Adult Probation Violation Rates by Means of the Cohort Approach, 55 J. Crim, L.C. & P.S. 70 (1964); England, What is Responsible for Satisfactory Probation and Postprobation Outcome?, 47 J. Crim. L.C. & P.S. 667 (1957); Diana, Is Case-work in Probation Necessary?, 34 Focus 1 (1955); England, A Study of Postprobation Recidivism Among Five Hundred Federal Offenders, 19 Fed. Prob. (Sept. 1955), at 10; Caldwell, Preview of a New Type of Probation Study Made in Alabama, 15 Fed. Prob. (June 1951), at 3; Monachesi, A Comparison of Predicted with Actual Results of Probation, 10 Am. Soc. Rev. 26 (1945); Hughes, An Analysis of the Records of Some 750 Probations, 13 Brit. J.

Ed. Psych. 113 (1943); Gillin & Hill, Rural-Urban Aspects of Adult Probation in Wisconsin, 5 Rural Soc. 314 (1940); Menken, The Rehabilitation of the Morally Handicapped, 15 J. Crim. L.C. & P.S. 147 (1924).

This tidal wave of authority, carefully researched and studied, compelling probation in cases where the offense was nonviolent and the defendant is capable of rehabilitation, grows day by day.

Another advantage to the use of probation is the simple point of economy. If a cheaper system appears to be more effective, then should it not be used? Probation costs something less than one-tenth the cost of imprisonment. The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures, §2.3 and comment (3) at 73.

The American Bar Association's study has concluded that probation should be imposed unless the sentencing court finds that confinement is necessary to protect the public from further criminal activity by the offender or that the defendant is incapable of rehabilitation. Neither of those exceptions apply here.

Attorney's Affirmed Statement.

Perhaps the most persuasive factors urged in this application are the ineffectiveness of an "(a)(2) sentence" and the comparative sentence chart included in our petition. We cannot believe that this Court intended that the Slutsky brothers should serve a longer period of confinement than that of Tony "Ducks" Corallo, extortionists, perjurers, counterfeitors, forgerers, and other men who have offended the community more grossly than either Ben or Julius Slutsky. And of course, Ben Slutsky's serious illness demands reconsideration of his sentence. But furthermore, the Court should now be convinced that there is no tax deficiency and thus, no income taxes were evaded, or at the very least, there is a substantial doubt created concerning the petitioners' evasion of taxes. Certainly, these features change dramatically the picture presented to the Court at the time of conviction.

It only remains to be said that Ben and Julius Slutsky stand before this Court in the very twilight of their lives. Neither have ever been convicted of a crime before, and both have led exemplary lives. It is indeed regrettable that in the closing days of their existence, their reputations had to be blemished by this unfortunate accusation. They have both drunk their shame to the dregs. They have both been branded felons. One must ask

how much more suffering they should be made to endure under a civilized system of justice. We urge it would be inhumane to have these two men thrown in jail at their ages and in their physical condition. It would accomplish no purpose. Niether of these men need any rehabilitation and history has taught us that the deterrent feature inherent in this form of punishment is questionable at least and nonexistent at most.

A humane system of justice should allow them to spend their few remaining days with their families where they are so desperately needed. There they will be able to do good for the community, as they have in the past. We must never become so fascinated by the art of our enterprise as to lose sight of its human goal - justice. By placing them on probation, the community gains and the government really loses nothing.

For all these reasons, it is most respectfully urged that the petitioners' sentences be reduced to probation and that this Court grant such other and further relief as is just under all the circumstances.

Respectfully submitted,

E. STEWART JONES, SR.
28 Second Street
Troy, New York 12181

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

Attorneys for Petitioners

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES,
of Counsel

Attorney's Affirmed Statement.

ELIZABETH A. HORTON
MEMORIAL HOSPITAL

RECORDS OF BEN J. SLUTSKY
DURING CONFINEMENT FROM

May 20, 1973 to June 16, 1973

EXHIBIT "A"

Attorney's Affirmed Statement.

ELE HOTEL, NEVELE RD. MIDD ETOWN NEW YORK
LENVILLE, NY 39314-3

RATE	ACCOM	ROOM NO	NUR STAT	PATIENT	PATIENT NO
75	PRIV	2009	CP2	SLUTSKY, BEN J.	39314-3

CONTRACT NO	INS CODE	ADDRESS	PATIENT'S PHONE NO
633 9-9 9 N 01	1	MARION WIFE NY NEVELE HOTEL NEVELE RD., ELLENVILLE,	647 6000

GROUP NO	DO YOU HAVE OTHER INS? YES NO	GUARANTOR	SERVICE	RELATIONSHIP
		SLUTSKY, BEN J. (6)	MED	SELF

DATE OF ADMISSION	ADDRESS GUARANTOR CITY STATE ZIP	PHONE NO
05/20/73 6:00PM	SAME	647 6000

SUBSCRIBER	NOTIFY	REL	PARISH	ORIGIN	MARITAL STATUS	CITIZEN
BEN J.	HOTEL SAME TELEPHONE	HEB		W	M	US

DIAGNOSIS	AGE	SEX	ATTENDING PHYSICIAN	ADMISSION DATE	TIME
CARDIAC ARRHYTHMIA ASHD & GOUT	63	M	LAZAR	05/20/73	6:00PM

ATTENDING PHYSICIAN	BIRTH DATE	BIRTHPLACE	DISCHARGE DATE	TIME
DR. LAZAR	06/12/09	ELLENVILLE, NY	6-16-73	12[illegible]

SUBSCRIBER'S EMPLOYER	PROVISIONAL DIAGNOSIS	PREVIOUS HOSPITAL DATE
SELF EMPLOYED	HEART DISEASE & GOUT CARDIAC ARRHYTHMIA ARTERIOSCLEROTIC	9/16/66

SUBSCRIBER'S EMPLOYER'S ADDRESS	PATIENT NAME	ROOM NO
NEVELE HOTEL	SLUTSKY, BEN J.	2009

RESPONSIBLE PARTY'S OCCUPATION	FATHER'S NAME	SOCIAL SECURITY NO
OWNER	JOSEPH	

RESPONSIBLE PARTY'S EMPLOYER	MOTHER'S MAIDEN NAME
	YETTA RUBIN

DATE OF BIRTH	AGE	ADMITTED	REFERRED	HOW	INFORMANT
06/12/09	63	MB/	DR. LAZAR	WALK	53197

TRANSFER TO SERVICE ON DOCTOR

SURGEON

OPERATION DATES	PRIMARY OPERATION	CODE NO
5/22, 6/5	SECONDARY OPERATIONS 1 Liver Scan	94.6
	2	
	3	

COMPLICATIONS
1 HOSPITAL INFECTION ☐ YES ☐ NO
2 WOUND INFECTION ☐ YES ☒ NO
3 OTHER

PRIMARY FINAL DIAGNOSIS	
Type B Serum Hepatitis	999.2
SECONDARY FINAL DIAGNOSES 1	E931
2 Gout	274.0
3 ASHD	412.9
4	250.0
PATHOLOGICAL REPORT PRIMARY OPERATION Probable Mallotus	

DRUG THERAPY

☐ ORAL ANTIDIABETICS	☐ DIURETICS	☐ SULFAS
☐ INSULIN	☐ ANTIHYPERTENSIVES	☐ ANTIBIOTICS
☐ THYROID ANTITHYROID	☐ VASODILATORS	☐ TRANQUILIZERS
☐ STEROID HORMONES	☐ CARDIAC REGULATORS	☐ OTHER
☐ CANCER CHEMOTHERAPY	☐ ANTICOAGULANTS	☐ NONE

CONSULTATIONS WITH DOCTORS

RELEASED AGAINST ADVICE YES NO — SIGNED RELEASED YES NO

CONDITION ON DISCHARGE RECOVERED (IMPROVED) UNIMPROVED NOT TREATED DIAGNOSIS ONLY EXPIRED

AUTOPSY YES NO — COR CASE

I HAVE EXAMINED AND APPROVED THIS COMPLETE MEDICAL RECORD ON 19 PHYSICIAN'S SIGNATURE

CHART COPY

Attorney's Affirmed Statement.

PHYSICAL EXAMINATION

NAME Ben Slutsky HOSP. NO. ----------

GENERAL APPEARANCE: Patient appears somewhat fatigued.

HEAD: The hair is thin. Scalp normal.

EARS: Canals and drums normal. No hearing defects.

EYES: Pupils round, regular and equal, react to light and accomodation. EOM intact. Sclera nonicteric. No significant retinopathy.

NOSE: No nasal discharge or membrane changes.

MOUTH: Tongue not coated. Buccal membranes, pharynx and gums show no lesions.

NECK: No thyroid megaly. No enlarged nodes. No distended neck veins. No arterial bruits. No nuchal rigidity.

CHEST: Normal configuration.

BREASTS: No masses or nipple secretions.

HEART: BP: 141-50/90. Regular sinus rhythm. Not enlarged to percussion. No murmurs. No rubs. No evidence of congestive failure.

LUNGS: Clear to P & A. Dampened breath sounds. No rhonchi. No wheezes. No cardiac failure or rales.

ABDOMEN: Slightly distended. Slight tenderness epigastrium. Liver and spleen not felt. No masses. No ascites. No aneurysms.

BACK: No sacral edema or bone tenderness.

RECTAL: Recent sigmoidoscopy at the office for symptoms of rectal bleeding showed some internal hemorrhoids but no other significant lesions. Prostate 1-2+, nodular. No other findings.

GENITALIA: Penis, scrotal sac and testes normal.

EXTREMITIES: No clubbing, cyanosis. Arterial pulses felt peripherally. No calf tenderness or varices. DTR's intact.

SKIN: No lesions.

IMPRESSION: Arteriosclerotic heart disease with recurrent angina and arrhythmia.
Diabetes mellitus.
Known gout.
Exogenous obesity.
Rectal bleeding, source to be determined.
? upper G I or gallbladder disease.

LAL/pm

LOUIS A. LAVAN, M. D.

Attorney's Affirmed Statement.

HISTORY SHEET 2009

Name- Ben J. Slutsky **Hospital No.** 39314-3

CHIEF COMPLAINT: Palpitation. Recurrent precordial pain. Anorexia. Nausea. Also weakness and fatigability.

FAMILY HISTORY: History of diabetes and heart disease. (father)

PAST HISTORY:

Medical: Known gout for several years. Also known moderate elevation of BUN for several years. Also recent recurrent angina and palpitation.

Surgical: Noncontributory, except low back syndrome for which he has been previously hospitalized.

PRESENT ILLNESS: Patient has complained of the chief complaints noted above increasingly over the last month or so. He has previously had a history of some palpitations and precordial distress. He is also a known diabetic and has recently been on DBI one tablet a day. The chief complaints have intensified to a considerable degree in the past week and it was decided to hospitalize him. Several weeks ago an electrocardiogram done at my office showed an episode of paroxysmal ventricular tachycardia with a run of about ten beats which is spontaneously remitted.

SYSTEM REVIEW: No fever. Head - some headaches and dizziness. Ears - No ringing or buzzing of the ears or hearing changes. Eyes - No visual changes or diplopia. Nose - No nosebleeds or nasal discharge. Mouth - no bleeding gums or burning of the tongue. No sore throat. Respiratory tract - No hoarseness, cough, wheezing, sputum, hemoptysis or pleural pain. Cardiac - See present illness. Labile hypertension. No edema. Some exertional dyspnea. G I tract - Some nausea and anorexia. Some gassiness. No diarrhea, constipation. No tarry or bloody stool. GU tract - Slight frequency and urgency. Occasional dysuria. No significant nocturia. No hematuria. Neuromuscular system - Generalized fatigability and weakness. No unusual bone or joint pain. No claudication. No varices or phlebitis. Skin - No lesions or itching.

DICTATED: 5/22/73
TYPED: 5/29/73

L. A. LAZAR, M. D.

Ben Slutsky,

PROGRESS NOTES

5-2 -73
59314-3
[illegible] RD. DR. LAZAR
ELLENVILLE, NY
MED 63Y
2009 53197
SLUTSKY, BEN J

May 20! Admission note (H/P dictated)

year old male pt admitted with recent history of recurrent paroxysmal bouts of cardiac arrhythmia (one of V. tach documented) precordial oppression dyspnea weakness. FH of diabetes ASHD. Personal history labile hypertension. gout. Also recurrent Anginal pain last few days —

Pt low grade fever noted. Also history recent ↑ obstipation — occas blood on stool. Sigmoidoscopy at office showed some [illegible] Hem. To do Barium enema

May 21 Vastly abnormal liver enzymes ↑ Bilirubin is 2.0 Some O_2 Undersaturation. Uric acid 8.9! CO_2 (39) Cl 95 K = 3.6 BUN 22

Diabetes mellitus — Dx was made by another M.D.)
Evaluation to proceed!

He been on DBI, Librium, Esidrex & Zyloprim: potential basis for toxic hepatitis

May 22 Liver function data increasingly abnormal. To cut all Rx Evaluation being pursued

Attorney's Affirmed Statement.

PROGRESS NOTES

May 23 Au Sh. Antigen Positive!
[illegible] Exam normal
Liver Scan noted
To repeat Au Antigen since
this was unexpected

May 24 2nd Au Antigen Positive
Liver function tests done by me on
7/15 PTA showed SGPT 75 / SGOT 73
but no other specific suggestions
of an intercurrent hepatitis
In view of Au antigen results
the ? of autoimmune disease will be
tabled for present
Explained / Instructed about
same

May 25 Absolute observation, Continue [illegible]

5-2 -73
NEVELE HOTEL NEVELE RD.
ELLENVILLE, NY
2009 53197

59311-3
DR. LAZAR
MED 63Y P/R PROGRESS NOTES
SLUTSKY, BEN J.

May 26 Feels OK / improved except for severe obstipation. Following data / Stable.

May 27 Afebrile. No sig. interval change

May 28 Some evidence of [illegible] & elevation of some of the enzymes. Alk PH / Bilirubin about same. To start Zyloprim for hyperuricemia. Had been on it before!

May 29 Review of cardiac data now shows evidence of multiple types of arrhythmia: paroxysmal supraventricular tachycardia; paroxysmal ventricular tachycardia and multiple episodes of extrasystoles (both ventricular & auricular): all indicating very irritable heart. The glucose tol test out!

May 30 Doing well. No glycosuria. [illegible] normal. Repeat enzymes tomorrow.

Attorney's Affirmed Statement.

PROGRESS NOTES

May 31 All enzymes suddenly (↑)
again with Bilirubin up to (3.1). To
cut all nonessential Rx including Zyloprim
which could be ~~an~~ etiology of ↑ secondary insult
& restrict activity !!

June 1 Chem to be repeated today to
see result of the cutting Zyloprim &
restriction

PM Bilirubin 5.0 today (↑) —
and confirms Bedside observations
Enzyme abnormalities little changed
No fever

June 2 No complaint. [illegible]

June 4 SMA 18 again tomorrow
No clinical changes.

59511-5
NEVELE HOTEL NEVELE RD. DR. LAZAR
ELLENVILLE, NY MED 63Y /1/
2009, 53197 SLUTSKY, BEN J.

PROGRESS NOTES

June 5 Bilirubin ⑦.5 ↑. All other enzymes about same. To repeat scan because of overall changes and the character of initial scan report
BZ

Clinically more jaundiced & more anorexia. To repeat other data to evaluate current trend. Reason for deterioration not clear – but generally unhappy [illegible] repercussions to start BZ

6/7/73 - Consent for liver biopsy

I consent to the performance of a liver biopsy by Dr Alexander [illegible]

Ben J Slutsky

Attorney's Affirmed Statement.

PROGRESS NOTES

5-2?-73 39314-3
NEVELE HOTEL NEVELE RD. DR. LAZAR
ELLENVILLE, NY MED 63Y /1/
2009 53197 SLUTSKY, BEN J.

⑧ June 7 Consultation note by Dr
Robinson [illegible] reviewed – &
current course Rx to be continued
problem of possible lighting up of
diabetes by steroids considered

6/8 pt comfortable. No complaint. Temp normal.
Pt has type B hepatitis c̄ active process
in the liver

6/9 Bilirubin & Transaminase value
definitely improving with start of
steroid Rx. No glycosuria. Clinically
much improved

6/10 Prednisone po initiated 60 mg a day
Clinical course cont. to improve

6/11 stable No glycosuria
Steroids initiated po

6/12 Cont sig fall in all hepatic data
(glucose only 148 in spite of steroid
(? hepatic factor) Bun ↑ uric acid ↑ ? [illegible]

5-20-73 39314-3
NEVELE HOTEL NEVELE RD. DR. LAZAR
ELLENVILLE, NY MED 63Y 717
2009 53197 SLUTSKY, BEN J.

PROGRESS NOTES

6/7/73 - Consultation - Dr Alexander [illegible]
1050 Fifth Ave New York

Pt is a 63 yr old executive who entered the hospital on 5/20/73 complaining of weakness, fatigability, anorexia and palpitation. He has known of the presence of diabetes, gout and hypertension for the past several years and takes 2 DBI daily, was taking Zyloprim + 1 ~~[illegible]~~ Esidrix daily. There is no history of needle administration, dental care, hepatitis contacts. He did eat shellfish.

Shortly after admission, dark urine was noted - Blood studies showed positive Australia antigen. Bilirubin 3.5 rising to 5 to 7.5 to 09.5

SGOT 630 → 564 → 912 → 906 → 882
SGPT 1534 → 1446 → 1840 → 1700 → 1656
Alk φ 227 262
302 243 229

Liver scan - ? cold area along inferior edge
Px - alert, jaundiced, no spiders, no asterixis, no liver palms
Heart, reg - lungs clear
Abdomen soft Liver edge palpable

With positive HAA, the diagnosis of viral hepatitis B is substantiated. The present regimen can be continued and steroids begun yesterday because of symptoms suggestive of liver failure should be continued. If liver biopsy performed - will be very helpful

PROGRESS NOTES

5-20-73 39314-3
NEVELE HOTEL NEVELE RD. DR. LAZAR
ELLENVILLE, NY MED 63Y /1/
2009 53197 SLUTSKY, BEN J.

6/13: Liver Biopsy Report from Mt Sinai: Viral Hepatitis - no breakdown to interstices between cells

6/14 at 144. feels much improved. Chem report in Dr. Stern's file. further reduced. To go to 40 mg Prednisone daily

6/15 pt is doing OK. Biopsy Report not available yet scan suggests tumor [illegible] positive Aus antigen could be incidental finding -

6/16. Biopsy as noted in 6/13 note (viral hepatitis). Yesterday bilirubin (4.4) — Discharged to convalesce at home

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 6/5/73 AGE 63 yrs. ADMISSION NO. 3831[illegible]

NAME Ben J. Slutsky WARD [illegible] 2009

REQUEST FOR EXAMINATION Liver scan

ESSENTIAL CLINICAL DATA (repeat)

SERVICE Dr. Lazar

X-RAY NO.

FINDINGS

A liver scan was performed using Technetium 99m. Sulfur Colloid. The findings are identical to the last liver scan. I have the impression that this is some sort of anomalous lobe or possibly indentation from a falciformed ligament.

IMPRESSION: No change since the last examination.

Lowell Glendening MD

T. Glendening, M. D. ab

ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 5/22/73 AGE 63 ADMISSION NO. 39314-3

NAME Ben J. Slutsky WARD 2009

REQUEST FOR EXAMINATION Liver scan

ESSENTIAL CLINICAL DATA Hepatomegaly - ? gallstones

SERVICE Dr. Lazar

X-RAY NO.

FINDINGS

A liver scan was performed using Technetium 99m Sulphur Colloid. The liver is normal in size and shape. There are two cold areas both seen along the inferior edge of the liver. One could be porta hepatis area. However, both to me appear more prominent than the usual porta hepatis defect and I cannot rule out liver mass. The fact that there is more than one defect suggests the possibility of metastatic disease.

[redacted]

F. Glendening, M. D./pm
ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON
MEMORIAL HOSPITAL

RECORDS OF BEN J. SLUTSKY
DURING CONFINEMENT FROM

August 31, 1973 to September 13, 1973

EXHIBIT "B"

Attorney's Affirmed Statement.

SLUTSKY BEN J — THE ELIZABETH A. HOATON MEMORIAL HOSPITAL
NEVELE HOTEL NEVELE RD — MIDDLETOWN, NEW YORK
ELLENVILLE NY 43100-3

TYPE: PRIV	ROOM: 2009	RATE: C2	
75 150L XXXX			
CONTRACT NO: 633 929 9 N 01	INS. CODE: 1		
GROUP NO: /	DO YOU HAVE OTHER INS? YES / NO		
DATE OF ADMISSION: 08/31/73 5:55 PM			
SUBSCRIBER: BEN J			
DIAGNOSIS: HEPATITIS			
ATTENDING PHYSICIAN: LAZAR			
SUBSCRIBER'S EMPLOYER: SELF EMPLOYED			
SUBSCRIBER'S EMPLOYER'S ADDRESS: NEVELE HOTEL			
RESPONSIBLE PARTY'S OCCUPATION: OWNER			
RESPONSIBLE PARTY'S EMPLOYER:			
DATE OF BIRTH: 06/12/09	AGE: 64Y		

PATIENT: SLUTSKY BEN J			PATIENT NO: 43100-3
ADDRESS: NEVELE HOTEL NEVELE RD ELLENVILLE NY			PATIENT'S PHONE NO: 647 6000
GUARANTOR: SLUTSKY BEN J	(6)	SERVICE: MED	RELATIONSHIP: SELF
ADDRESS GUARANTOR: SAME	CITY: WIFE MARION	STATE / ZIP	PHONE NO: 747 6000
NOTIFY: HOTEL SAME ADD & TEL	REL: HEB	PARISH / ORIGIN: W	MARITAL STATUS: M
			CITIZEN: US
AGE: 64	SEX: M	ATTENDING PHYSICIAN: LAZAR	ADMISSION DATE: 08/31/73
BIRTH DATE: 06/12/09	BIRTHPLACE: ELLENVILLE NY	DISCHARGE DATE: 9-13-73	TIME: 1145 AM
PROVISIONAL DIAGNOSIS: HEPATITIS			PREVIOUS HOSPITAL DATE: 06/16/73
FAMILY DOCTOR: SLUTSKY BEN J			ADMIT NO: 2009
FATHER'S NAME: JOSEPH			SOCIAL SECURITY NO:
MOTHER'S MAIDEN NAME: YETTA RUBIN			
ADMITTED BY: MN	REFERRED BY: LAZAR	HOW ADMITTED: WALKED	INFORMATION BY: 39314-3

TRANSFER TO / SERVICE ON / DOCTOR

SURGEON

OPERATION DATES	PRIMARY OPERATION	CODE NO
	SECONDARY OPERATIONS 1.	
	2.	
	3.	

COMPLICATIONS
1 HOSPITAL INFECTION ☐ YES ☐ NO
2 WOUND INFECTION ☐ YES ☐ NO
3 OTHER

PRIMARY FINAL DIAGNOSIS: Acute type II (B) Cerrer Hepatitis — 999.2 E949

SECONDARY FINAL DIAGNOSES
1
2
3
4

DRUG REACTION
No.....
Yes.....
Explain.....

PATHOLOGICAL REPORT - PRIMARY OPERATION

DRUG THERAPY

☐ ORAL ANTIDIABETICS	☐ DIURETICS	☐ SULFAS
☐ INSULIN	☐ ANTIHYPERTENSIVES	☐ ANTIBIOTICS
☐ THYROID / ANTITHYROID	☐ VASODILATORS	☐ TRANQUILIZERS
☐ STEROID HORMONES	☐ CARDIAC REGULATORS	☐ OTHER
☐ CANCER CHEMOTHERAPY	☐ ANTICOAGULANTS	☐ NONE

CONSULTATIONS WITH DOCTORS

RELEASED AGAINST ADVICE: YES / NO — SIGNED RELEASED: YES / NO

CONDITION ON DISCHARGE: RECOVERED / IMPROVED / UNIMPROVED / NOT TREATED / DIAGNOSIS ONLY / EXPIRED

AUTOPSY: YES / NO — COR CASE

HAVE EXAMINED AND APPROVE THIS COMPLETE MEDICAL RECORD ON 19 PHYSICIAN'S SIGNATURE

CHART COPY

Attorney's Affirmed Statement.

HISTORY SHEET

Name Ben J. Slutsky Adm. 8/31/73 2009 Hospital No. 43100-3

CHIEF COMPLAINT: Nausea, anorexia, weakness.

FAMILY HISTORY: See old chart.

PAST HISTORY:

Medical:

Surgical: See old chart.

PRESENT ILLNESS:

Patient was discharged from this hospital about a month ago after a prolonged stay for assessment and treatment of type 2 hepatitis (Australia-antigin positive). His recovery had been excellent after a period of bed rest and the use of steroids. He left the hospital with no symptoms and continued to due well until about ten days ago. He apparently had been more active than he should have been, he had taken trips to the mid-west and far west. While in California a week ago, he started noticing the onset of nausea and anorexia. Examination at the office several days ago indicated a significant increase in abnormal Transaminase values and a bilirubin level of slightly under 4 mg. He is hospitalized for further evaluation.

REVIEW OF SYSTEMS:

No focal changes other than noted in chief complaints since his discharge a month ago.

Louis Lazar, M. D.

LL:jl
dict. 9/9/73
typed 9/12/73

Attorney's Affirmed Statement.

PHYSICAL EXAMINATION

NAME BEN J. SLUTSKY HOSP. NO. ----------

General Appearance:	Alert and well developed.
Head:	Hair thin. Scalp normal.
Ears:	Canals and drums normal. No hearing defect.
Eyes:	Pupils round, regular and equal, react to light and accommodation. EOM intact. Sclera appears slightly icteric. Fundi normal.
Nose:	No nasal membrane changes or discharge.
Mouth:	Tongue slightly coated. Buccal membranes, pharynx and gums show no lesions.
Neck:	No nuchal rigidity. Thyroid not palpable. No distended neck veins. No arterial bruits. No enlarged nodes.
Chest:	Normal configuration.
Breasts:	No masses or nipple secretions.
Heart:	B/P 138/96. Not enlarged. Regular sinus rhythm. No murmurs. No congestive failure.
Lungs:	Clea to P & A. No rales, no rhonchi. No expiratory wheezing.
Abdomen:	Slightly distended. Liver edge not felt. Spleen not felt. No masses. No ascites. No aneurysms.
Back:	No sacral edema or bone tenderness.
Genitalia:	Penis and scrotal sac and testes normal.
REctal:	1 + nodule prostate. No masses. Stool brown.
Extremities:	No clubbing or cyanosis. No edema. No calf tenderness. Arterial pulses easily palpable. DTR's intact.
Skin:	Tan and icterus not grossly visible.
Diagnosis:	Australia positive hepatitis (serum type B) with acute exacerbation.
ADDENDUM:	Patient also has mild diabetes and hyperuricemia.

Louis Lazar, M. D.

LL:jl
dict. 9/9/73 - typed 9/12/73

8/31/75
NEVELE HOTEL
ELLENVILLE NY
2009 . 39514-3

4510?-3
LAZAR
MED 64Y /1/
SLUTSKY BEN J

Attorney's Affirmed Statement.

PROGRESS NOTES

8/31 A.J. Nak

pt known to have type B Hepatitis (SH) came to Hospital c elevated Liver enzymes & Bilirubin. He is slightly jaundiced. pt has mild Diabetes Mellitus

Admitted DE BP 140/100 Temp 98 H.R. 90 Chest clear abd. NO Liver Enclosures or Splenomata Chronic Liver Disease

Dx: active Hepatitis. Such acute

A Dan

9/1 pt has elevated SGPT, LDH, SGOT alk P & total Bilirubin. Blood Sugar is ↑ & creatinine is also High How much of the enzyme elevation is related to Renal. Insufficiency is difficult to say. pt will need Liver Biopsy & if evidence of auto immune Hep long term Steroid therapy is indicated if

PROGRESS NOTES

& globulin is high & this by itself is indication of sub. acute active hepatitis.

9/3 pt is improved liver function studies improving has glycosuria no aceton. had palpitat- cause ? peripheral neuropathy c̄ postural hypotension ? EKG ordered.

9/4 Diabetes seen intensified the treat by steroid Rx - liver data clearly improved + steroid dose will be tapered shortly. Some T wave ECG abnormalities

9/5 Gen status stabilizing. Still [illegible] glycosuria due to steroid Rx

Attorney's Affirmed Statement.

/31/73
EVELE HOTEL
ELLENVILLE NY
2009 39314-3

43100-3
LAZAR
MED 64Y /1/
SLUTSKY BEN J

PROGRESS NOTES

9/5 Bilirubin (1.7) [illegible] Enzyme improving
Still glycosuria Clinically
better

9/6 NO complaint. Day OK

9/7 By glycosuria persists will have to
reduce steroids as quickly as possible
& feasible as indicated by liver data

9/8 Stable Awaiting new lab following data

9/9 All parameters of liver disease continue
to improve. Glucose yesterday of 260
at [illegible] glucose spillage Less - no
new findings

9/10 Less glycosuria Cont. improvement
No abnormal physical finding

9/11 Cont'd remission of hepatic enzyme
abnormalities will discharge soon convalescence
at home

9/12 Cont'd improvement in enzyme
studies Home in AM

Attorney's Affirmed Statement.

NAME SLUTSKY, Ben ROOM # HOSP. NO. 43100-3

DISCHARGE SUMMARY: ADMITTED: 8-31-73 DISCHARGED: 9-13-73

This 64-year-old male was recent admitted and treated at this hospital for serum B (type II) hepatitis. He was admitted with intensification of syndrome. This was noted by the acute onset of nausea, anorexia and abdominal bloating for five days prior to admission. The Australia antigen was positive on admission. Pro time was 14 over 11. Serum protein electrophoresis showed a 1.9 gammaglobulin, 3.8 Albumen. The initial SGP-T was 1098 and SGO-T was 305. Bilirubin was 3.4. Alkaline Phosphtase 181. The initial blood sugar was over 300mg%. BUN was normal. Electrolytes were normal.

Liver was not palpable, but was slightly tender. Liver scan was not done.

The patient was treated with Prednisone and gradually remitted all his abnormal values, so at the time of discharge, his Glucose was 293. He was spilling only intermittent Glucose. The SGO-T was 100. SGO-T was 370. Bilirubin was down to 1.6. Alkaline Phosphatase was borderline (96).

Chest X ray wasnormal except for some discoid atelectasis. The electrocardiogram showed some abnormal T-waves consistent with posterolateral wall ischemia.

The patient was discharged to be treated at home with continuing but reducing doses of Prednisone, Diadotherapy, glycosuria checking with coverage only if necessary, plus supplemental supportive measures.

Discharge Diagnosis: Acute type II (B) serum hepatitis.

Louis Lazar, M.D.

LL:BW#4
DICTATED: 9-13-73
TYPED: 9-17-73

153

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 9/4/73 AGE 64 yrs. ADMISSION NO. 43150-3

NAME Ben J. Slutsky WARD 2009

REQUEST FOR EXAMINATION Chest

ESSENTIAL CLINICAL DATA

SERVICE Dr. Lazar

X-RAY NO. 69506

FINDINGS

Frontal and lateral views of the chest are exposed and compared to a prior study of September 1, 1973. Once again there are findings of bilateral discoid atelectasis on the basis with some horizontal linear densities than may be fibrous, and no evidence of active lung disease or definite cardiomegaly.

Warren M. Eisenberg M.D.

H. M. Eisenberg, M. D. ab

ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 9/1/73 AGE 64 yrs ADMISSION NO. 43100-3

NAME Ben J. Slutsky WARD 2009

REQUEST FOR EXAMINATION Chest

ESSENTIAL CLINICAL DATA hepatitis

Prior Radiation Therapy

SERVICE Dr. Lazar

X-RAY NO. 69350

FINDINGS

There is basilar discoid atelectasis bilaterally. The heart is normal in size and no infiltrates or effusions are noted.

IMPRESSION: Basilar discoid atelectatic changes.

Tom Glendening MD

T. Glendening, M. D./erw
ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON
MEMORIAL HOSPITAL

RECORDS OF BEN J. SLUTSKY
DURING CONFINEMENT FROM

November 29, 1973 to December 12, 1973

EXHIBIT "C"

Attorney's Affirmed Statement.

NEVELE HOTEL, NEVELE RD ELIZABETH A. HORTON MEMORIAL HOSPITAL
ELLENVILLE NY MIDDLETOWN NEW YORK

RATE $75	ACCOM PRIVATE	46313-3 9 SERV STAT 507-1	C1	PATIENT SLUTSKY BEN J			PATIENT NO 46313-3 9
CONTRACT NO BC633929 NO1		INS CODE 1		ADDRESS NEVELE HOTEL, NEVELE RD ELLENVILLE NY WIFE MARION 12428			PATIENT'S PHONE NO 647 6000
GROUP NO	DO YOU HAVE OTHER INS? YES NO			GUARANTOR SLUTSKY BEN J (6)		SERVICE MED	RELATIONSHIP SE;F
DATE OF ADMISSION 11/29/73 1:10 PM				ADDRESS GUARANTOR SAME	CITY STATE ZIP		PHONE NO 647 6000
SUBSCRIBER SELF				NOTIFY HOTEL SAME ADD & TEL	REL HEB	PARISH ORIGIN W	MARITAL STATUS M / CITIZEN US
DIAGNOSIS HEPATITIS				AGE 64 / SEX M	ATTENDING PHYSICIAN DR LAZAR 290	ADMISSION DATE 11/29/73	TIME 1:10PM
ATTENDING PHYSICIAN DR L LAZAR				BIRTH DATE 06/12/09	BIRTHPLACE ELLENVILLE NY	DISCHARGE DATE [illegible]	TIME 7:15 P.
SUBSCRIBER'S EMPLOYER SELF EMPLOYED OWNERS				PROVISIONAL DIAGNOSIS HEPATITIS			PREVIOUS HOSPITAL DATE 09/13/73
SUBSCRIBER'S EMPLOYER'S ADDRESS BC THRU MONTICELLO				PATIENT NAME SLUTSKY BEN J			ROOM NO 507
RESPONSIBLE PARTY'S OCCUPATION RACE TRACK				FATHER'S NAME JOSEPH SLUTSKY		SELF	SOCIAL SECURITY NO
RESPONSIBLE PARTY'S EMPLOYER				MOTHER'S MAIDEN NAME YETTA RUBIN			
DATE OF BIRTH 06/12/09	AGE 64Y			ADMITTED BY LMS	REFERRED BY DR L LAZAR	HOW ADMITTED CHAIR	INFORMATION BY PATIENT OR

TRANSFER TO SERVICE ON DOCTOR

SURGEON

OPERATION DATES	PRIMARY OPERATION	CODE NO
	none	
	SECONDARY OPERATIONS 1	
	2	
	3	

COMPLICATIONS
1 HOSPITAL INFECTION ☐ YES ☐ NO
2 WOUND-INFECTION ☐ YES ☐ NO
3 OTHER

PRIMARY FINAL DIAGNOSIS: Serum (type) B Chronic active Hepatitis — 1992 E-14
SECONDARY FINAL DIAGNOSES 1: Diabetes Mellitus — 250
2: Chronic Cholecystitis — Cholelithiasis 575.1
3:
4:

PATHOLOGICAL REPORT - PRIMARY OPERATION

DRUG THERAPY

☐ ORAL ANTIDIABETICS	☐ DIURETICS	☐ SULFAS
☐ INSULIN	☐ ANTIHYPERTENSIVES	☐ ANTIBIOTICS
☐ THYROID ANTITHYROID	☐ VASODILATORS	☐ TRANQUILIZERS
☐ STEROID HORMONES	☐ CARDIAC REGULATORS	☐ OTHER
☐ CANCER CHEMOTHERAPY	☐ ANTICOAGULANTS	☐ NONE

CONSULTATIONS WITH DOCTORS

RELEASED AGAINST ADVICE YES NO — SIGNED RELEASED YES NO

CONDITION ON DISCHARGE: RECOVERED / IMPROVED / UNIMPROVED / NOT TREATED / DIAGNOSIS ONLY / EXPIRED

AUTOPSY YES NO — COR CASE

I HAVE EXAMINED AND APPROVED THIS COMPLETE MEDICAL RECORD ON 19 PHYSICIAN'S SIGNATURE

CHART COPY

Attorney's Affirmed Statement.

HISTORY SHEET 507

Name Ben J. Slutsky Hospital No. 46313-3

CHIEF COMPLAINT: Marked weakness, nausea, low grade fever, persistent cough.

FAMILY HISTORY: Father had diabetes and vascular disease.

PAST HISTORY:

Medical: See present illness.

Surgical: Noncontributory.

PRESENT ILLNESS: The patient has been admitted to this hospital several times over recent months for complications and problems related to type B hepatitis (Australian antigen positive). These symptoms and this diagnosis have been confirmed by appropriate studies, as well as repeated positive Australia antigen studies plus liver biopsy. The balance of his disease required long steroid therapy which has been gradually withdrawn. As a consequence of the steroid therapy his latent mild diabetes was unmasked so that it became a problem with respect to ultimately required Tolinase therapy which has been reduced as the steroid dose has been reduced. In addition, he has had periodic episodes of angina pectoris with ventricular extrasystoles. On one occasion had a lot of ventricular tachycardia.

Several weeks ago patient had the onset of acute respiratory infection with a broncho-sinusitis which persisted. In the wake of this he has become extremely weakened and depressed. He has recurrent nausea, bloating and distention.

Because of the symptom complex persistence, as well as persistence of underlying abnormalities of liver function we felt he should be rehospitalized and evaluated in terms of his current position.

SYSTEM REVIEW: About 30 lbs. weight loss since his admission. Head - Recurrent headaches and dizziness. No ringing or buzzing of the ears or hearing changes. Eyes - No visual changes or diplopia. Nose - no nosebleeds or nasal discharge. Mouth - No bleeding gums or burning of the tongue. No sore throat. Respiratory tract - No hoarseness, cough, wheezin sputum, hemoptysis or pleural pain. Cardiac - No palpitations noted. Some exertional dyspnea. Occasional percordial pain. GI tract - Nausea and anorexia. No diarrhea. No constipation. No melena or hematemesis. Some recurrent distention. GU tract - Slight frequency and dysuria. No hematuria. Occasional nocturia. Neuromuscular system - Generalized fatigability and weakness. No unusual bone or joint pain. No claudication. No edema. Skin - No lesions or itching.

Attorney's Affirmed Statement.

PHYSICAL EXAMINATION

NAME Ben J. Slutsky HOSP. NO. 46313-3

GENERAL APPEARANCE: Patient is alert and responsive. There is no overt jaundic

HEAD: Hair is normal distribution. Scalp shows no lesions.

EARS: Canals and drums normal. No hearing defect.

EYES: Pupils r.r.e., react to light and accomodation. No gross scleral icterus. EOM intact.

MOUTH:

NECK: No nuchal rigidity. No distended neck veins. Thyroid not palpable. No auditory bruit.

CHEST: Normal configuration.

BREASTS: No masses or nipple secretions.

HEART: BP: 124/86. RSR. No murmurs. No enlargement. No congestive failure.

LUNGS: A few punctate rhonchi bilaterally. No expiratory wheezing or rales.

ABDOMEN: Slightly distended. Liver one finger below the costal margin. No splenomegaly. No masses, ascites or aneurysms.

GENITALIA: Penis, scrotal sac and testes normal.

BACK: No sacral edema or bone tenderness.

RECTAL: Recent examination showed 1+ lobulated prostate. No masses. Stool brown.

EXTREMITIES: No edema. DTR's intact. Arterial pulses easily palpable. No calf tenderness. No arthritic changes.

SKIN: No lesions.

IMPRESSION: Chronic active hepatitis (type B).
Diabetes mellitus.
Recent broncho-sinusitis.
Arteriosclerotic heart disease and recurrent angina.

LAL/pm

LOUIS A. LAZAR, M. D.

DICTATED: 12/2/73
TYPED: 12/3/73

11/29/[illegible] NCB 1 10313-3 D **Attorney's Affirmed Statement.**
DR L LAZAR 64 PROGRESS NOTES
NEVELS HOTEL, NEVELS 30 MSB
ELLENVILLE NY 12428
SLUTSKY JOAN J M 507

Addendum NOR (11/29) (H&P dictated)

64 y/o old male with chronic active hepatitis (onset in [illegible]) with x prior admissions for same problem now admitted with history of marked malaise, low grade fever, recent persistent dyspepsia suggestive for cholestasis. He has gradually lost interest in food and withdrawn over 2 months. Past Rec is persistence of moderately elevated transaminase value (400-700) + bilirubin between 1.0 mg% - 2.0 mg%.

Pt is West Indian Negro type B Hepatitis

In addition required use of steroids which masked diabetes which was under control with daily dose of steroid but has become brittle as steroids were withdrawn

Admitted for evaluation & appropriate Rx

[illegible]

PROGRESS NOTES

Dec 1 No fever SGOT SGPT > 800
Bilirubin 12. [illegible] Hosp. consult
Elec (nml). PT 14/11 Glucose (non-fast
) 101 No glycosuria

Dec 2 R for Bronchitis proceeding No
Other clinical change Afebrile

Dec 3 No fever less nausea.
No glycosuria Improved

Dec 4 Lab data with re: to liver
status about same. Glucose level 161

Dec 5 GI Series tomorrow Nausea
persists.

Dec 6 pt may have chronic active Hepatitis. If
globulin is high steroid may be indicated

Dec 7 Has Tachycardia Rate 120/ct EKG Taken
showed. Sinus tach NO sig change from previous
tracing. Temp is elevated Blood culture ordered.
He ~~has~~ gallop rhythm. will digitalize. Poss SBE?

11/29/73 MED 1 46313-3 9
DR L LAZAR 64
NEVELE HOTEL, NEVELE RD HEB
ELLENVILLE NY 12428
SLUTSKY BEN J M 507

PROGRESS NOTES

Dec 6 GI series today. No report. Nausea the dominant problem now.

Dec 8 Low grade temp for 3 days - GI series noted. To do GB series. Nausea less.

Dec 9 Afebrile NSR No [illegible] No focal symptoms or finding. To have GB series tomorrow.

Dec 10 GB not visualized today. Liver Chem & Bilirubin [illegible] & cont to improve. Bilirubin 1.0 mg%

Dec 11 GB repeated - Result (?) Afebrile. Stable. Hopefully home Dec 13. Non visualizing GB!

Dec 12 Discharged. Data today shows Trans Enzymes about 20's. Alk Phosphatase down to 137 and bilirubin 1.0 mg%. Glucose 153 (non fasting) Uric Acid normal. To follow at Home. Non vis GB ? due to hepatic disease? GB disease

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 11/30/73 AGE 64 yrs. ADMISSION NO. 46313-3

NAME Ben J. Slutsky WARD 507

REQUEST FOR EXAMINATION Chest

ESSENTIAL CLINICAL DATA Prior Radiation Therapy

SERVICE Dr. Lazar

X-RAY NO. 76962

FINDINGS

Frontal and lateral views of the chest are exposed demonstrating a poor inspiratory effort, a tortous descending aortic contour, and otherwise unremarkable findings.

M. N. Eisenberg, M. D./erw

ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 11/30/73 AGE 64 yrs. ADMISSION NO. 46313

NAME Ben Slutsky WARD 507

REQUEST FOR EXAMINATION sinuses

ESSENTIAL CLINICAL DATA R/O sinusitis

SERVICE Dr. Lazar

X-RAY NO. 76962

FINDINGS

Sinuses:

The frontal, ethmoid, maxillary antrum and sphenoid sinuses are well aerated and normally developed. The mucoperiosteum is delicate and the bony walls intact.

IMPRESSION: Normal paransal sinuses.

M. Eisenberg M.D. m/m
ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 12/6/73 AGE ~~61 yrs.~~ ADMISSION NO. 46313-3

NAME Ben J. Slutsky WARD 507

REQUEST FOR EXAMINATION G. I Series

ESSENTIAL CLINICAL DATA r/o ulcer disease

SERVICE Dr. L. Lazar

X-RAY NO. 77396

FINDINGS

Swallowing function is normal. There is a sliding hiatal hernia without evidence of esophagitis or ulceration. There is no evidence of reflux.

The stomach is high and horizontal, but otherwise unremarkable. The duodenal bulb is within normal limits. The duodenal sweep appears open because of the high position of the stomach, but I do not believe that there is either effacement or displacement. The ligament of Treitz has a normal location. The visualized proximal small bowel is unremarkable. There is a persistent extrinsic pressure-type defect on the posterior and greater curvature aspect of the duodenal bulb which is almost undoubtedly due to the gallbladder.

M. N. Eisenberg, M. D.

ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 12/10/73 AGE 6 yrs. ADMISSION NO. A6213-3

NAME Ben J. Slutzky WARD 507

REQUEST FOR EXAMINATION Gallbladder series

ESSENTIAL CLINICAL DATA

SERVICE Dr. Lazar

X-RAY NO. 77639

FINDINGS

After two days of oral contrast material, the gallbladder fails to visualize.

IMPRESSION: Nonvisualizing gallbladder.

T. Glendening, M. D. ab

ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON
MEMORIAL HOSPITAL

RECORDS OF BEN J. SLUTSKY
DURING CONFINEMENT FROM

January 13, 1974 to January 29, 1974

EXHIBIT "D"

NEVELE HOTEL NEVELE RD
ELLENVILLE NY 47780-4 9

ELIZABETH A. HORTON MEMORIAL HOSPITAL
MIDDLETOWN NEW YORK

RATE 75
ACCOM PRIV
ROOM NO 506-1
NUR STAT CP2
CONTRACT NO 633 929 9 N01
INS CODE 1
GROUP NO
DO YOU HAVE OTHER INS? YES NO
DATE OF ADMISSION 1/13/74 1:50 PM
SUBSCRIBER SELF
DIAGNOSIS CHRONIC ACTIVE HEPATITIS DIABETES, POSS GALL BLADDER DISEASE
ATTENDING PHYSICIAN DR LAZAR
SUBSCRIBER'S EMPLOYER HOTELOWNER
SUBSCRIBER'S EMPLOYER'S ADDRESS BC THRU MONTICELLO RACEWAY
RESPONSIBLE PARTY'S OCCUPATION OWNS NEVELE HOTEL
RESPONSIBLE PARTY'S EMPLOYER
DATE OF BIRTH 06/12/09
AGE 64

PATIENT SLUTSKY BEN J
ADDRESS WIFE- MARION NEVELE HOTEL NEVELE RD ELLENVILLE NY 12428
GUARANTOR SLUTSKY BEN J 6
ADDRESS GUARANTOR SAME CITY STATE ZIP
NOTIFY HOTEL SAME ADD & TEL
REL HEB
PARISH
ORIGIN W
AGE 64
SEX M
ATTENDING PHYSICIAN DR LAZAR 290
BIRTH DATE 06/12/09
BIRTHPLACE ELLENVILLE NY
PROVISIONAL DIAGNOSIS POSSIBLE GALL BLADDER DISEASE CHRONIC ACTIVE HEPATITIS DIABETES
PARENT'S NAME SLUTSKY BEN J
FATHER'S NAME JOSEPH
EMERGENCY ADMISSION
MOTHER'S MAIDEN NAME YETTA RUBIN
ADMITTED BY RA/MN
REFERRED BY DR LAZAR
HOW ADMITTED CHAIR
INFORMATION BY O/R & PT

PATIENT NO 47780-4 9
PATIENT'S PHONE NO 647 6000
SERVICE MED
RELATIONSHIP SELF
PHONE NO 647 6000
MARITAL STATUS M
CITIZEN US
ADMISSION DATE 1/13/74
TIME 1:50 PM
DISCHARGE DATE 1-29-74
TIME 11:55 AM
PREVIOUS HOSPITAL DATE ~~48313~~-3 9 12/12/73
ROOM NO 506
SOCIAL SECURITY NO

TRANSFER TO
SERVICE ON
DOCTOR
SURGEON

OPERATION DATES	PRIMARY OPERATION	CODE NO
1/22	Liver biopsy	50.2
1/18	SECONDARY OPERATIONS 1. Liver Scan	99.6
1/25	2. IVC c̄ tomos	98.3
	3	

COMPLICATIONS
1. HOSPITAL INFECTION ☐ YES ☐ NO
2. WOUND INFECTION ☐ YES ☐ NO
3. OTHER

PRIMARY FINAL DIAGNOSIS
A. (ASCVD)
Hyperuricemia 6
Chronic active Hepatitis 573.0

SECONDARY FINAL DIAGNOSES
1.
2. Serum type B Aust Ant Positive
3. Diabetes Mellitus 250 0
4. ? Carotid artery occlusive disease
~~Arteriosclerotic Heart Disease~~

DRUG REACTION
No
Yes

PATHOLOGICAL REPORT - PRIMARY

DRUG THERAPY
☐ ORAL ANTIDIABETICS
☐ INSULIN
☐ THYROID ANTITHYROID
☐ STEROID HORMONES
☐ CANCER CHEMOTHERAPY
☐ DIURETICS
☐ ANTIHYPERTENSIVES
☐ VASODILATORS
☐ CARDIAC REGULATORS
☐ ANTICOAGULANTS
☐ SULFAS
☐ ANTIBIOTICS
☐ TRANQUILIZERS
☐ OTHER
☐ NONE

CONSULTATIONS WITH DOCTORS

CONDITION ON DISCHARGE RECOVERED [✓ IMPROVED] UNIMPROVED NOT TREATED DIAGNOSIS ONLY EXPIRED
RELEASED AGAINST ADVICE YES NO
SIGNED YES RELEASED NO
AUTOPSY YES NO
COR. CASE

I HAVE EXAMINED AND APPROVED THIS COMPLETE MEDICAL RECORD ON 19
PHYSICIAN'S SIGNATURE

CHART COPY

01/13/74 [illegible] 1 17760-4 9
LAZAR 64
NEVELE HOTEL NEVELE RD HEB
ELLENVILLE NY 12428
SLUTSKY [illegible] 000

PROGRESS NOTES

Ben Shettley

Jan 13 Admission Note

Readmission of patient (61 yr old ♂) with known chronic active hepatitis (Au positive) since this summer and diabetes mellitus, 1st identified by steroid therapy, used for Rx of his hepatitis

Now constant nausea, anorexia & low grade fever whose etiol is not clear (due to hepatitis + necrosis ongoing) (? [illegible])

Jan 13 Episode of loss of vision right eye about 12-14 days ago (lasted 2-3 min) — then loss of vision (OS) sudden for same period ~~yesterday~~ 3 days ago. Full recovery of vision both times. No carotid bruits heard

Clearly has been having low grade temp (100.6 p. rectum) to-date it has risen to 102 Since note will do blood cultures; will also [illegible] ordered Carotid circulation to be assayed Fundi to be evaluated

RO CA

PROGRESS NOTES

1/14/74 EYE Clin. History and old charts reviewed

While visiting patient he was feeling "weak spell". Had symptoms sweaty & pulse 140+.
Since then has noticed [illegible] of vision for 2 or 3 minutes in the
(L) eye 3 weeks ago and recently same episode in (R) eye.
No significant past eye history other than glasses.

V [illegible] normal

Adnexa ✓
Cornea - normal
Pupils: RRLA react to (L) & (A)
Lens clear
Fundi: No evidence of diabetic retinopathy
Vascular shows 1+ sclerosis and degenerative changes in pigment epith.
Venous circulation normal.

T eye soft.
No glaucoma

Extra- free.
Cardiac - no point lead

Imp: Normal eyes. One would think that his episodes of "amaurosis fugax" related to either spasm or embolic phenomena. Because of tachycardia, it probably contributory. I would further want just to observe the problem only if episodes repeat themselves further investigation [illegible]

1/14/74 pt. has tachycardia. Temp 101 H.R. 110/1'
Chest clear lungs normal valium
Dosage increased

01/13/71 MED 1 47780-4 9
LAZAR 61
NEVELE HOTEL NEVELE RD HEB
ELLENVILLE NY 12428
SLUTSKY BEN J M DOS

PROGRESS NOTES

1/14 Clearly working a fever whose etiol is not clear. Blood & urine cultures initiated. No new problems beyond those in basic history.

Jan 15 Fever continued today. Blood cultures negative thus far. Au Antigen still positive. GB series tomorrow.

Jan 16 Still low grade fever. To be repeated tomorrow to do BSP. To start on combined garamycin + Keflex therapy empirically!! Have discussed entire case with Dr Rechman (ASH) who will see him in consultation & the empirical approach has been decided.

Jan 17 GB not visualized. Febrile spike. Possible could be drug induced (cross reaction Keflex & Penicillin). To cut both drugs for the moment. Steroid dose given.

Jan 18 Fever down after ② doses steroids & cutting antibiotics. BSP 12% accounts for non visual GB. Scan awaited.

01713774 MED 1 47780-4 9
LAZAR 64
NEVELE HOTEL NEVELE RD HEB
ELLENVILLE NY 12428
SLUTSKY BEN J M 506

PROGRESS NOTES

Jan 14 Fever down. [illegible] scan data
To discuss status with Dr. [illegible]
Spoke with re: to GB + liver biopsy
Liver scan negative —
next order of business - biopsy (liver)
[illegible] 38 - ([illegible] problem) Oz

Jan 20 Discussing liver biopsy with Dr [illegible]. Pt improved clinically & afebrile stable Oz

January 20th Surgery
HISTORY REVIEWED
KNOWN DIABETIC (TREATED Ē DBI)
HEPATITIS DIAGNOSED 9 MONTHS AGO.
MAIN SYMPTOMS: "TIREDNESS", ANOREXIA, NAUSEA. (NO ABDM. PAIN)
ORAL GB SERIES — NON VISUALIZATION
IMPRESSION ① DIABETES ② CHRONIC HEPATITIS ③ POSSIBLE GB DISEA.
DO NOT BELIEVE THAT ANY DEFINITE CONCLUSION REGARDING GB CAN BE REACHED BECAUSE NON-VIS. MAY BE DUE TO HEPATITIS.
SUGGEST IVC WHICH MAY GIVE MORE INFORMATION (IF COMMON DUCT VISUALIZES BUT GB DOES NOT, THEN THIS WOULD BE VERY SUGGESTIVE OF GB DISEASE; IF NEITHER THE COMMON DUCT NOR GB VISUALIZES THEN NO CONCLUSION CAN BE MADE.)
AGREE WITH LIVER BIOPSY (WILL X-MATCH 1 UNIT & DO 1/21)
IF GB DISEASE IS DEMONSTRATED, WOULD NOT RECOMMEND SURGERY AT THIS STAGE

PROGRESS NOTES

Jan 21 In view of BSP level I have doubt that there will be adequate duct visualization, but it is worth a try (after liver biopsy)

JAN 21 74 TRANSCOSTAL LIVER BIOPSY PERFORMED PERFORMED ē VIM-SILVERMAN NEEDLE. ONLY SMALL PIECE OF LIVER TISSUE COULD BE OBTAINED.

JAN 22 74 FOLLOWING LIVER BIOPSY - VITAL SIGNS STABLE, PT FEELS WELL, ABDOMEN SOFT & NON-TENDER Hb 13.0 gm% → 11.6 gm%. WILL REPEAT & OBSERVE

Jan 22 Fell down on head.
Hb/Hct down - dilutional (?) ? slight bleed.
To try IVC Jan 23

Jan 23 BUN (37) unusually [illegible] are enzymes almost normal afebrile.
Await liver biopsy report & IVC which should "talk".

01/13/74 [illegible] 47730-4 9
LAZAR 64 [illegible]
NEVELE HOTEL NEVELE RD HEB
ELLENVILLE NY 12428
SLUTSKY BEN J M 506

PROGRESS NOTES

Jan 24 Biopsy reported noted. Also noted is the high Gamma globulin (2.4 gm) and the relative hypoalbuminemia (2.9 gm). These findings suggest steroids might be very effective (as they have clinically). IVC tomorrow. No glycosuria yet on steroid

Jan 26 IVC yesterday. Awaiting result apparently inconclusive due to poor dye filtration. More plans today. To cut steroid dose.

Jan 27 Afebrile No glycosuria ASA no CBC

Jan 28 Stable. No spillage. Home tomorrow

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 1/17/74 AGE 64 yrs. ADMISSION NO. 47780-4

NAME Ben J. Slutsky WARD 506

REQUEST FOR EXAMINATION Gallbladder series

ESSENTIAL CLINICAL DATA Chronic active hepatitis

SERVICE Dr. Lazar

X-RAY NO. 80545

FINDINGS

Numerous films of the gallbladder after two consecutive oral doses of Telepaque, followed by a dose of Oragrafin granules, fail to demonstrate evidence of gallbladder opacification. Residual opaque in the bowel demonstrates that the patient received and retained the agent.

IMPRESSION: Nonvisualization.

K. Rapoport, M. D. ab

ROENTGENOLOGIST

1-76

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 1/18/74 AGE 64 ADMISSION NO. 47780-4

NAME Ben Slutsky WARD 506

REQUEST FOR EXAMINATION Liver scan

ESSENTIAL CLINICAL DATA Chronic active hepatitis

SERVICE Dr. Lazar

X-RAY NO.

FINDINGS

A repeat liver scan is compared with the previous liver scans of 6/5/73 and 5/22/73 failing to demonstrate any interval change. Again the inferior border of the liver has a notched appearance as on the earlier examinations which probably is a normal anatomical variant. The uptake is homogeneous. There is no evidence of hepatomegaly.

IMPRESSION: No interval change.
Negative liver scan.

J. Barie, M. D./pm
ROENTGENOLOGIST

Attorney's Affirmed Statement.

ELIZABETH A. HORTON MEMORIAL HOSPITAL

60 PROSPECT AVE., MIDDLETOWN, N. Y.

X-RAY CONSULTATION

DATE 1/25/74 AGE 64 ADMISSION NO. 47780-4

NAME Ben Slutsky WARD 506

REQUEST FOR EXAMINATION IVC c tomos

ESSENTIAL CLINICAL DATA Jaundice color - gallbladder disease

SERVICE Dr. Lazar

X-RAY NO. 81381

FINDINGS

After scout films of the right upper quadrant, an injection of Cholografin Methylglucamine is made. There is fairly prompt visualization of unremarkable extrahepatic duct system, with visualization of what I believe represents the gallbladder. Sequential views fail to demonstrate evidence of filling defect within the gallbladder, and a twenty-four hour film fails to give additional information.

IMPRESSION: Extrahepatic duct system appears unremarkable. Visualization of the gallbladder at this time, following a recent double dose oral cholecystogram without evidence of visualization suggests two possibilities. The first would be that the patient had a cystic duct calculus which has now passed. The second would be that the patient did not take the contrast agent, although study of the prior films does demonstrate that there was some sort of radiopaque material within the bowel which was construed by the Radiology Department as representing Telepaque. The third choice would be that the disease process involves the water absorptive capacity of the gallbladder mucosa, and that this is a manifestation of chronic cholecystitis without demonstrable calculi.

Maurice N. Eisenberg M.D.

M. N.Eisenberg, M. D./pm

ROENTGENOLOGIST

Attorney's Affirmed Statement.

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF ORANGE)

LOUIS A. LAZAR, being duly sworn deposes and says:

1. That deponent is a physician duly licensed to practice medicine in the State of New York and maintains offices at 27-31 Ridge Street, Middletown, Orange County, New York.

2. This affidavit is submitted as a review and report on the physical condition of Benjamin J. Slutsky of Ellenville, New York.

3. Mr. Slutsky's current health problems are an outgrowth of an attack of type B Hepatitis which first presented in May of 1973. HE BECAME ACUTELY AND VIOLENTLY ILL WITH THIS DISEASE AT THAT TIME. It has resulted in FOUR periods of hospitalization at the Horton Hospital in Middletown, New York, some of which have been prolonged. A supplemental listing of his periods of hospitalization will be appended to this communication. In addition, he was hospitalized once in Florida during this period of illness because of uncontrolled diabetes provoked by Cortisone treatment required for the control of his hepatitis.

The diagnosis of hepatitis (type B) was established by laboratory testing and liver biopsy. This diagnosis was also substantiated in consultation with Dr. Alexander Richman, Chief of the Liver Disease Section at the Mount Sinai School of Medicine, New York City. Mr. Slutsky was severely jaundiced and semi-stuporus on the occasion of his first hospitalization. Because of evidence of deepening jaundice

and imminent liver failure, it became necessary to treat Mr. Slutsky with high does of Cortisone in order to save his life. His hepatitis became partially controlled, but a pre-existing diabetes mellitus became markedly intensified. Ultimately his hepatitis became less intense, but his diabetes became a management problem. He lost about forty pounds of weight during this period of illness. As previously indicated, while attempting to convalesce in Florida on one occasion hospitalization for uncontrolled diabetes was required.

It is important to emphasize that this disease remains active. RECENT LIVER FUNCTION TESTS DONE ON 9 APRIL, 1974 SHOW AN INCREASING ABNORMALITY OF HIS LIVER FUNCTION ONCE AGAIN. ANOTHER LIVER BIOPSY (DONE AT THE TIME OF HIS LAST HORTON HOSPITAL ADMISSION) SHOWED CONTINUING ACTIVE HEPATITIS.

The PROGNOSIS of his problems with respect to both his now chronic active hepatitis and diabetes mellitus is very guarded. This form of prolonged active hepatitis is unusual and requires constant ongoing medical care, relief from all physical and mental stress humanly achievable, and special attention to diet. This is complicated further by the marked variations in his diabetes occasioned by the necessity to use Cortisone in varying doses to keep his hepatitis from becoming intense again.

It is my firm clinical judgement that Mr. Slutsky's health status is indeed precarious. Any change in the ongoing care and attention will tend to seriously jeopardise his health. He must have

a combination of prolonged rest, specific and variable diet therapy which will of necessity change with the circumstances of his hepatitis and diabetes; continuing specialized medical care and judgement. The potential for liver failure, cirrhosis, complicating secondary infection, additional complications relating to variations in the intensity of his diabetes (already documented to be a significant and highly variable problem) are all real and threatening.

In addition to these ongoing active major problems, Mr. Slutsky has active gout, and a tendency to cardiac arrhythmias and mild coronary insufficiency symptoms. Treatment of his gout has been limited because it has been demonstrated that drug therapy intended to lower his uric acid levels (the abnormal chemical in gout) has resulted in aggravation of his hepatitis. Prior to his hepatitis problem, he had no problems in the use of these drugs.

I CONSIDER MR. SLUTSKY TO BE ACTIVELY AND SERIOUSLY ILL. I am aware of his current legal problems and the projected disposition of these problems in the court decision handed down. It is my FIRM MEDICAL OPINION that the implementation of this sentence will doubtless result in a serious downturn in the health of Mr. Slutsky based on all of the objective evidence and clinical experience on record since the on-set of his hepatitis problem. I have no doubt that should the sentence be implemented, a threat to his life is a serious possibility - and failing that - many serious complications are likely to occur.

Attorney's Affirmed Statement.

I would therefore urge that consideration of these serious matters relating to his health be given every priority in determining the disposition of the problems now before the court.

3. Attached hereto are copies of the medical records of the Horton Memorial Hospital, Middleton, Orange County, New York.

Louis A Lazar

LOUIS A. LAZAR

Sworn to before me this

17th day of May 1974.

Eileen M. Cullough

NOTARY PUBLIC

EILEEN McCULLOUGH
Notary Public, State of New York
Qual. Co. Clerk's #4[illegible]
Comm. Expires March 6[illegible]76

Attorney's Affirmed Statement.

DATES OF HOSPITALIZATION AT

HORTON MEMORIAL HOSPITAL
PROSPECT AVENUE
MIDDLETOWN, NEW YORK 10940

Admitted	Discharged
20 May 1973	16 June, 1973
31 August, 1973	13 September, 1973
29 November, 1973	12 December, 1973
13 January, 1974	29 January 1974

Attorney's Affirmed Statement.

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

550 BROAD STREET
NEWARK, NEW JERSEY 07102

May 8, 1974

E. Stewart Jones, Esq.
78 Second Street
Troy, New York 12181

Dear Mr. Jones:

In accordance with your request, we have prepared the summary set forth below of certain payroll and general disbursement checks represented to have cleared "The Nevele" checking accounts at Ellenville National Bank and First National Bank and Trust Company of Ellenville during the years ended December 31, 1965, 1966, and 1967 that bore a certain stamp as described in (2) in the following paragraph.

In the preparation of this summary, we have performed only the following:

(1) received, from Mr. Charles Slutsky, certain payroll and general disbursement checks represented by him to have cleared the above bank accounts during the thirty-six months ended December 31, 1967;

(2) ascertained those checks that bore a stamp for deposit only, which stamp included multiple names, among which were "The Nevele", "Nevele Hotel", "Nevele Country Club", "Ben J. Slutsky", and "Julius Slutsky"; and

(3) accumulated the amounts of those checks referred to in (2) above by month, based on the month the checks were represented to us by Mr. Charles Slutsky to have cleared the banks, and entered the totals on the following summary:

Attorney's Affirmed Statement.

	1965	1966	1967
Payroll Checks:			
January	$ 26,415	$ 37,560	$ 37,881
February	29,440	32,053	37,408
March	36,855	41,018	45,749
April	32,189	37,815	35,515
May	34,406	36,439	45,406
June	43,124	49,385	58,978
July	40,550	45,937	52,005
August	50,673	57,571	62,404
September	40,481	46,382	54,688
October	40,084	41,318	64,752
November	42,699	51,713	51,576
December	32,024	32,475	45,326
Total	448,920	509,666	591,749
General Disbursement Checks:			
January	5,768	7,488	21,154
February	3,043	8,473	8,752
March	6,173	5,284	4,515
April	5,218	8,328	15,389
May	2,757	19,002	8,275
June	5,331	3,333	13,127
July	2,347	10,197	6,553
August	12,846	10,763	15,740
September	14,852	10,460	7,160
October	8,632	22,785	14,614
November	12,660	13,344	10,127
December	5,070	4,127	3,487
Total	84,697	123,584	128,853
Total All Disbursement Checks	$533,617	$633,250	$720,602

We have not examined any financial statements of The Nevele Country Club as of any date or for any period, and accordingly we express no opinion concerning any such financial statements.

Yours truly,

Haskins & Sells

Attorney's Affirmed Statement.

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS

550 BROAD STREET
NEWARK, NEW JERSEY 07102

May 8, 1970

E. Stewart Jones, Esq.
28 Second Street
Troy, New York 12181

Dear Mr. Jones:

In accordance with your request, we have (1) summarized the amounts of the cash receipts entries not credited to income accounts and the cash disbursements entries that reduced, or would reduce, recorded income, both as entered in the general ledger of The Nevele Country Club for the years ended December 31, 1965, 1966, and 1967, (2) compared such summary with the amounts of "non-income items" shown in United States Government Exhibits 100 through 108, inclusive, relating to United States vs. Ben J. Slutsky and Julius Slutsky, d/b/a The Nevele, which exhibits were made available to us by Mr. Charles Slutsky, and (3) indicated the resulting differences on the attached Summary of Recorded Non-Income Items Not Included in the United States Government Exhibits 100 Through 108, Inclusive, for the years ended December 31, 1965, 1966, and 1967. Such cash receipts entries, cash disbursements entries, and the amounts presented in the Summary of Recorded Non-Income Items Not Included in the United States Government Exhibits 100 Through 108, Inclusive, were not audited or verified by us, and accordingly we do not express any opinion on them.

We have not examined any financial statements of The Nevele Country Club as of any date or for any period, and accordingly we express no opinion concerning any such financial statements.

Yours truly,

Haskins & Sells

Attorney's Affirmed Statement.

THE UEVELE COUNTRY CLUB

SUMMARY OF RECORDED NON-INCOME ITEMS
NOT INCLUDED IN THE UNITED STATES GOVERNMENT
EXHIBITS 100 THROUGH 108, INCLUSIVE,
FOR THE YEARS ENDED DECEMBER 31, 1965, 1966, AND 1967
(UNAUDITED AND UNVERIFIED)

	1965	1966	1967
Taxes (Note 2).....	$24,176	$ 70,457	$ 75,270
Reduction of notes and loans receivable (Note 3).....	375	13,715	2,077
Guest income returns (Note 4).....	21,803	25,633	31,729
Reductions of income (Note 5).....	6,489	13,907	23,766
Credits to expense accounts (Note 6):			
Wages.....	763		
Payroll taxes and expenses.....	208	2,392	2,894
Food.....	136	1	5
Supplies.....		249	192
Operating expenses.....	3,237	4,717	4,345
Promotional expenses.....	292	1,428	993
Insurance.....	1,160	5,245	
Repairs and maintenance.....	200	750	1,016
General and administrative expenses.....	2,941	6,726	9,932
Credits to exchange account (Note 7).....	14,300	9,177	18,815
Credits to capital accounts (Note 8).....	9,904	25,000	35,000
Total.....	$85,984	$179,397	$205,594

NOTES:

1. This summary includes those items which have come to our attention to May 8, 1974 and does not necessarily represent all such items which may exist.

2. These amounts represent cash receipts entries credited to the general ledger expense account "taxes" in 1965 (including $5,542 transferred by journal entry) and credited to the general ledger liability account for taxes in 1966 and 1967.

(Continued) - 1.

Attorney's Affirmed Statement.

3. These amounts represent cash receipts entries credited to the general ledger account for notes and loans receivable.

4. These amounts represent cash disbursements entries charged to the general ledger account for returns to guests.

5. These amounts represent cash disbursements entries charged to the income account in the general ledger, including journal entry charges of $209 in 1966 and $2,314 in 1967 and less a journal entry credit of $151 in 1965.

6. These amounts represent cash receipts entries credited to the indicated expense accounts in the general ledger.

7. These amounts represent the excess of cash receipts entries credited to the general ledger account for exchanges over the amounts included in United States Government Exhibits 106, 107, and 108.

8. These amounts represent the excess of cash receipts entries credited to capital accounts in the general ledger over the amounts included in United States Government Exhibits 106, 107, and 108.

LSF:mcc

71-2358

Government's Affidavit in Opposition.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

-v- :

BEN J. SLUTSKY and JULIUS SLUTSKY, d/b/a "The Nevele", : AFFIDAVIT

72 Cr. 1235 (LFM)

Defendants. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

LAWRENCE S. FELD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and am in charge of the above-entitled case. This affidavit is submitted in opposition to the motion filed on behalf of defendants Ben Slutsky and Julius Slutsky for reduction of their sentences pursuant to Rule 35 of the Federal Rules of Criminal Procedure.

2. On July 17, 1974 this Court denied defendants' motion for a new trial, for a hearing on the motion and for bail pending a hearing and determination of the motion. On July 19, 1974 I advised counsel for the defendants by telephone that these motions had been denied and that the defendants would have to surrender on July 26, 1974. I received the papers in support of the Rule 35 motion on July 22, 1974. The notice of motion is dated May 28, 1974.

LSF:mcc
71-2358

No explanation is offered as to why it was filed and served more than a month and a half later. There is absolutely no reason why it could not have been submitted to this Court for decision with the motion for a new trial or while the latter was pending. Defendants' piecemeal approach to the post-appeal litigation in this case is unmistakably designed to achieve delay, imposes unnecessary burdens on the Court and the Government and ought to be viewed with disfavor.

3. The moving papers do not advance any persuasive reason why the defendants' sentences should be reduced. This case involved tax fraud of massive proportions perpetrated over a three year period by two men who were mature, wealthy and motivated solely by inordinate greed. There is nothing in the instant motion which diminishes the significance of these facts or indicates any contrition on the part of these two defendants for the serious crimes for which they were duly convicted more than a year and a half ago.

4. On March 19, 1973 this Court explained the reasons justifying the substantial sentences imposed on these defendants. There are no facts recited in the instant motion which might warrant reconsideration of those comments. They are well worth repeating here:

> "THE COURT: Your country has given you every advantage. You had the good fortune to have honorable, respected, hardworking parents. You were brought up in an intact home. You have achieved extraordinary financial success, respect in your community, and, obviously, the friendship of a great many people, some of great prominence.

The fact remains, however, the crimes committed in the instant case are enormous, both in terms of the amounts involved and the total absence of any mitigating reason for their commission.

In reality, you were no better than a common thief, and, in many respects, worse. You have repaid all these advantages which you received from your country with an enormous income tax fraud of almost a half a million dollars, over too long a period to make it anything approaching an innocent mistake.

The enormity of your greed is matched only by the audacity of your hypocrisy. Other little men pay their taxes unwillingly, right out of their paycheck. Many of their families are deprived because of that, yet here you are, a millionaire, cheating, defrauding, withholding on the country that has given you so much.

It has only been recently that white collar crime is getting the attention it deserves. The fact that this crime is not sensational and does not make the newspaper media makes it no less a crime that tears at the very roots of our society.

It strikes at the very basic foundation of the government, its founding principles and its ongoing practices. We cannot tolerate in a voluntary system of income tax the enormous evasion that took place here. Your protestations of innocence in light of the jury's verdict and of the overwhelming evidence in this case are just further evidence of your hypocrisy.

The ends of justice require the imposition of a prison sentence and the maximum fines permitted by law. It is almost common knowledge that the income tax laws are rigged in favor of the rich and against the poor.

It is a shame that I cannot impose the fines that your crimes permit. From half a million dollar evasion the maximum fine I can impose is a paltry, in your case.

* * * *

LSF:mcc
71-2358

"THE COURT: What I said with respect to your brother is equally applicable to you, every word of it, and there is no point in repeating it."

5. Much of the instant motion is devoted to tabulating the defendants' philanthropic activities which defense counsel alleges were not brought to the attention of the Court prior to sentencing. The record shows, however, that the defendants' charitable activities were made known to the Court and jury by several of the character witnesses whom the defendants called at trial (Tr. 384, 388-89, 391, 393). Furthermore, counsel for Ben Slutsky at the time of sentence stated to the Court: "You are aware of his charitable contributions." (Tr. 699). All philanthropy, of course, is praiseworthy. But it should not be forgotten that the defendants' ability to make large charitable donations was materially enhanced by their wilful failure to pay taxes on more than $1.2 million of unreported income over a three year period. Philanthropy is no excuse for fraud.

6. On the subject of comparative sentences, little need be said. If sentences imposed in other cases upon other defendants for other crimes were a critical factor in deciding this motion, a compilation of sentences of five years or more for non-violent crimes could be prepared which would match the length of the defendants' list. Even where persons are convicted for the same offense committed by these defendants, there are numerous reasons justifying different sentences, not the least significant

LSF:mcc
71-2358

of which are the amount of unreported income and evaded taxes involved, which here is enormous. The sentences imposed on these two defendants were the product of an informed discretion and should not be disturbed.

7. The only other aspect to this motion which merits further comment is the matter of Ben Slutsky's health. There is no claim that Julius Slutsky is unable to serve his sentence because of illness. As far as Ben Slutsky is concerned, it is not alleged that he is presently hospitalized or that hospitalization is essential to treat his various ailments. If further treatment is necessary, arrangements can be made so that he can serve his sentence at an institution where the necessary medication and care can be provided.

WHEREFORE, it is respectfully requested that the defendants' motions for a reduction of sentence be in all respects denied.

LAWRENCE S. FELD
Assistant United States Attorney

Sworn to before me this
23rd day of July, 1974.

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Endorsement by Judge MacMahon.

(74) ✓

United STates v. Slutsky

ENDORSEMENT
72 CR. 1235-LFM

The within motion for reduction or vacation of the sentences heretofore imposed upon the defendants and for bail pending determination of this motion is in all respects denied.

At the time of sentence, this court had the benefit of a very comprehensive presentence report, numerous letters from defendants' friends attesting to their virtues, and full exposition by defense counsel of all facts in mitigation of punishment. The court was also fully aware of the defendants' ages and present, as well as the probable future, state of health of both defendants. We were also aware that the federal prisons are equipped with hospitals and qualified physicians able to administer whatever medical treatments are necessary.

Aside from the fact that both defendants have grown older and that defendant Ben J. Slutsky has apparently been hospitalized on four occasions since the imposition of sentence, a fact which was quite clearly predictable at the time of sentence, defendants show no facts or law not fully considered by the court at the time of the imposition of their five-year sentences in March 1973, pursuant to 18 U.S.C. § 4208(a)(2).

These white-collar defendants were convicted of a massive tax fraud by a jury and have unsuccessfully exhausted their appellate remedies. The government has requested that the defendants surrender and start serving their sentences on Friday, July 26, 1974. Undoubtedly anticipating that request, defendants recently moved unsuccessfully for a new trial on the ground of newly discovered evidence, and now, in a last minute effort further to delay the date of surrender, have brought on the instant application. Defendants have already delayed the day of reckoning for sixteen months while their case proceeded through the appellate courts. Under all of the circumstances, we feel further delay of the day of reckoning would make a mockery of equal justice under law.

Accordingly, we deny the instant motion in all respects.

Dated: New York, N. Y.
July 24, 1974

Lloyd F. MacMahon

LLOYD F. MacMAHON
United States District Judge